



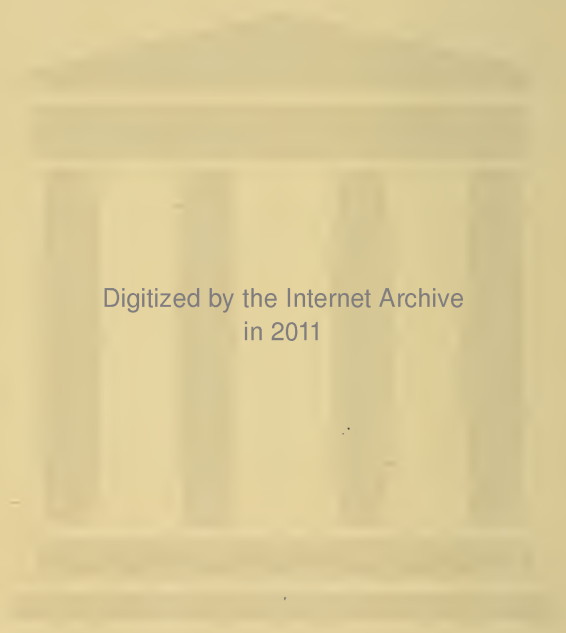
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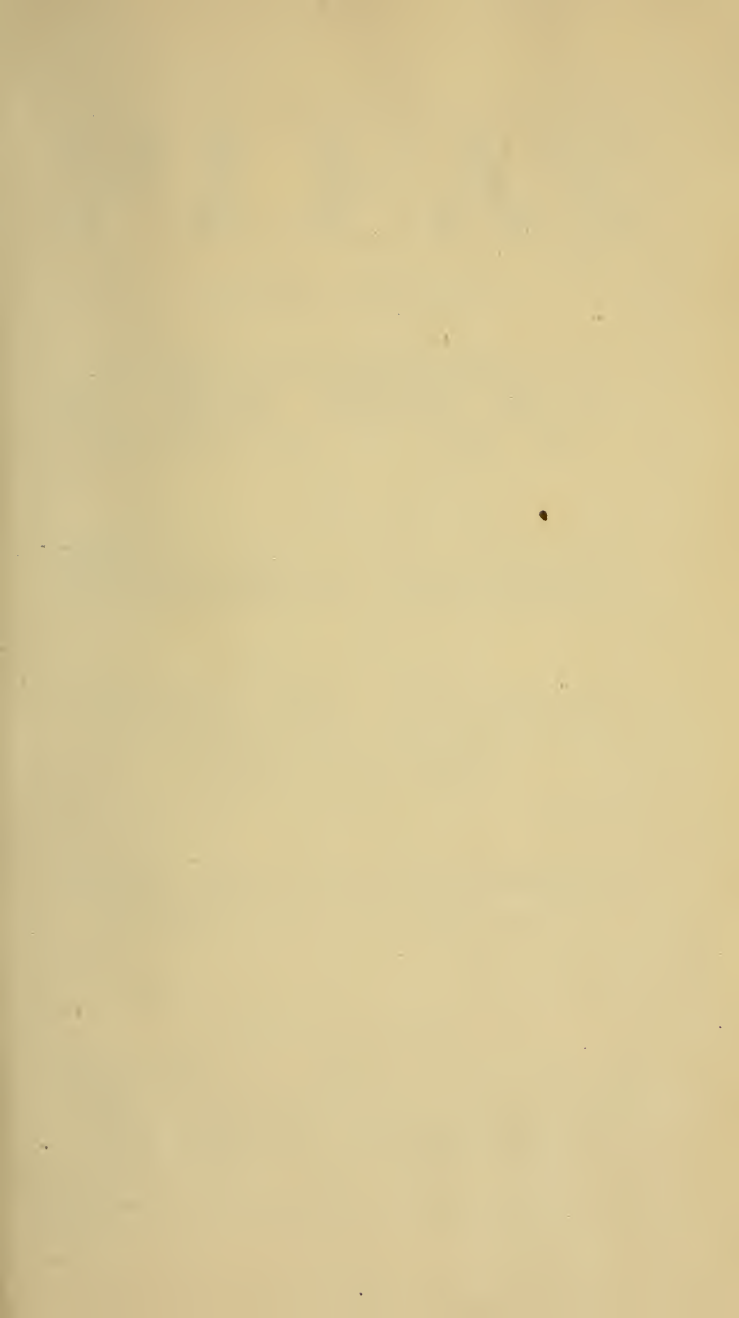
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PLEAS

OF THE

CROWN:

OR, A

Methodical Summary

OF THE

PRINCIPAL MATTERS

relating to that Subject.

By Sir *Matthew Hale*, Knight,
Late Chief Justice of the King's Bench.

L O N D O N:

Printed by the Assigns of *Richard* and
Edward Atkyns, Esquires; for *W. Shrewsbury*,
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PLAIN

CROWN

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William J. Adams

Editor of the

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THE PREFACE.

THere was lately Published an Impression, such as it was, of this Book without any Name of Author to it; but yet was commonly given out to have been Written by the late Chief Justice Sir Matthew Hale, and sold for a Book of his Writing. The Original indeed was written by him many years since: But that Impression, as it seems, was, from a surreptitious and very faulty Copy, and was accordingly very Faulty and Corrupt throughout in many respects, what by Omissions not only of Marginal References very frequently, but of many intire Paragraphs, whereby the Book it self is in many places mutilated, as the Reader may easily observe, pag. 19, 23, 48, 52, 57, 108, 110, 122, 183, 187, 200, 202, 203, 208. of that Impression

The Preface.

compared with this, besides divers other shorter, but not less material Notes left out in other places: What by Omissions and Mistakes of single Words, Sentences, and parts of Sentences, and sometimes by an unskilful Critical endeavour to restore to some sense what those Mistakes had made Nonsense, whereby the Sense is in many places maimed and broken, in some much altered, and in some expressed quite contrary to the Author's words and meaning. Instances whereof the Reader may see in pag. 2. lin. 17, p. 4. l. 1. p. 7. l. 6. p. 10. l. 17. p. 14. l. 6. p. 15. l. penult. p. 16. l. 13, &c. the like throughout the whole Book. And what by Transposition of divers matters misplaced among other things to which they have little or no affinity or relation, whereby they are not only wanting in their proper places, but the Order and Coherence of those other Matters among which they are interposed, is interrupted and confounded: Thus one half of the Matter belonging to this Title Process, which should have been continued p. 176, is placed
P. 191,

The Preface.

p. 191, 192, 193. under the *Tit. Pleas*, and the greatest part of the *Title Principal and Accessory*, which should have been continued p. 196, is there left off in the midst of a Sentence and placed before at p. 177. as if it was the beginning of the *Title*: and under the same *Title* four Paragraphs together, which belong to *Accessories* after, and should have been continued p. 180, where in the Original they have a connexion with what immediately preceeds and follows, are placed before at p. 179, among what belongs to *Accessories* before. Again, the greatest part of what belongs to the *Title Clergy*, and should have been continued p. 191, is placed p. 197, &c. under the *Tit. Arraignment*. To these might be added other Faults and Mistakes, but these may suffice to shew the general corruption of that Impression.

And though divers of these Faults and Mistakes are not to be imputed to any Negligence in the Transcriber or Publisher, (whereof notwithstanding he cannot be acquitted in others) but partly to his unacquaintance with the

The Preface.

Authors hand ; and partly to his Ignorance of his way of Writing, who frequently at the end of his Chapters or Sections used to leave more or less Blank paper, and when other matter occurred, more than could be inserted in those places, did many times write the rest in some other place, where he found most room for it, and for the most part without any Note of reference to it ; so that it was very difficult for any, who was not well acquainted with his Writings, to reduce those Transpositions to their proper places ; and therefore of the many Copies, which are abroad of this Book, I could never yet see any free from divers such Mistakes ; yet by this means (to mention no other) whether through want of Skill, or of Care, or of acquaintance with the Author's Hand and way of Writing, both the Author himself was much injured by the Publication in in that manner, and the Reader also.

Wherefore to do some Right to the Memory of the deceased Author, and to the Publick, and more particulary in some sort (as far as in respect of
some

The Preface.

some Circumstances was thought fit) to gratifie the Gentlemen of this Honourable Profession of the Law, who possibly may take it ill to be totally deprived of the benefit of the Writings of so great a Master in it, it was thought good by a Friend of the Authors, (whose Care the Author desired in the Publication of his Writings, after his death) to furnish the Bookseller with a compleat Copy corrected according to the Author's Original, only what things were therein transposed, were in the Copy reduced to their proper places, according to his Mind.

To this end it is fit also that the Reader be acquainted, that this Book was Written many years since, about the end of the Reign of King Charles the First, or not many years after; was not by the Author intended for the Press, nor fitted for it; and as he saith in a Letter to one of his Honourable Brethren, to whom he lent it, was then never read over by him since he wrote it, as the Reader may of himself perceive by some Faults, which had escaped him in writing,

The Preface.

and remain uncorrected, as p. 8. l. 22. after the word Dower it is apparent that the word [saved] or some such is wanting (which in the former Impression was endeavoured to be amended, but not without diminution of the Author's meaning) and some others, which are left to the Reader to correct according to his own Judgment, a Method often approved by the most judicious Criticks in the publishing of other mens Writings, and for some special Reasons at this time thought fit to be observed in this.

But lest while we endeavour to do Right to the Author, we should do Wrong to his Book, the Reader must also know, that notwithstanding what hath been said, this Book hath been well accepted and esteemed by divers of the most Eminent Lawyers, who much desired and obtained of the Author himself to have Copies of it many years since. And though probably the Author never at all read it entirely over after he wrote it, yet it is certain he many years after made divers occasional Additions to it: and,
if

The Preface.

f I be not much mistaken, he did usually carry it with him in his Circuits.

He hath written a large Work upon this Subject, Intituled, An History of the Pleas of the Crown, wherein he shews what the Law anciently was in these matters, what Alterations have from time to time been made in it, and what it is at this day. He wrote it on purpose to be printed, finished it, had it all transcribed for the Press in his life-time, and had revised part of it after it was transcribed; but whether, or when it will be published is uncertain. In This he doth summarily relate what the Law is at this time, or rather was when he wrote it, for some Alterations it hath since received, though not many, by some late Statutes; and therefore may not only be of use till that be published, but may also continue of good use after that is published, whenever it be, as the most proper Introduction for Students to this part of the Law that is extant, and as a Synopsis or Epitome of the most useful part of that.

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A Table of the Titles, and Method of the Book.

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his References.

C.M.Car. *Coke upon Magna Charta.*
C.West.I. *Coke upon W.I.*
C.PC. *Coke's Pleas of the Crown.*
Com. *Plowden's Commentaries.*
Cr.and Crom. *Crompton.*
Dal. *Dalton's Justice.*
Dy. *Dyer's Reports.*
Kel. *Kelway's Reports.*
Lamb. *Lambart's Justice.*
S.PC. *Stamford's Pleas of the Crown.*
4 R. *Coke's fourth Report.*
9 R. *Coke's ninth Report.*

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18 Mart.
1677.

Ri: Rainsford.

PLEAS

OF THE

Crown.

THis Treatise (is) divided under these Considerations:

1. Of the *Kinds* of Offences.
2. Of the *Incidents* unto these Offences.

The *Kinds* of the Offences are distinguished according to the diversity of the Laws by which they are introduced, *viz.*

Offences by the Common Law.
Offences by the Statute.

B

Offences

Pleas of the Crown.

Offences *by the Common Law*, distinguished according to the degrees of the Offence.

{ Capital.

{ Not Capital.

Of *Capital* Offences, they are such,

1. As are immediately against God.

2. Immediately against Man.

Those that are Offences *not Capital* by Common Law, as Misprisions, Maihem, Breach of the Peace, &c.

Offences *by the Stat.* { Capital.
 { Not Capital.

The latter are many, and not here to be treated of.

Heresie.

Heresie.

I. **N**OW first concerning Offences
Capital, that are *immediately*
against the Divine Majesty, which
 are

{ Heresie,
 { and
 { Witchcraft.

I. Concerning *Heresie*, wherein
 considerable,

I. *What is Heresie?*

At this day all those former Acts C Pl. c. 5.
St. 1 El. c. 1.
 which determined certain Points to
 be Heresie, stand repealed; and
 though there be no expresse Act de-
 termining what shall be said Heresie,
 yet the Statute of 1 El. c. 1. direct-
 ing the High Commission, restrains
 it.

1. To what formerly determined
 Heresie, by the Authority of the
 Canonical Scriptures.

2. To what adjudged so by the
 first four General Councils.

3. To what expressly adjudged
 B 2 Heresie

Heresie by any other General Council by expresse words of Canonical Scripture.

4. To what so determined by Parliament by assent of the Convocation.

II. Who to *judge* of Heresie?

1. The Temporal Judge cannot punish any Person for Heresie by Indictment, or otherwise:

But yet incidently he may take knowldge whether a Tenet be Heresie, or not: As where by force of the *Statute* of 2 *Hen.* 4. now repealed, *Kesar* was committed for saying, *That though he were Excommunicate by the Archbishop, he was not so before God:* and *Warner* Committed for saying, *Non tenetur solvere decimas*, and thereupon imprisoned: In a *Habeas Corpus* by the former, and a special Justification in an Action brought by the latter, adjudged neither Heresie.

2. All the *Statutes* that gave power to Arrest or Imprison for Heresie, viz. 2 *Hen.* 4. 15. 2 *Hen.* 5. 7. 5 *Rich.* 2. c. 5. 1 and 2 *Ph.* and

M. 5 E. 4.
Rot. 143.
coram Rege.

M. 11 H. 7.
R. 327. C. B.

and *Mar. c. 6.* are repealed by 1 *E-liz.*

III. The way to convict of Heresie.

I. By the Common Law.

1. By the Archbishops and Bishops in a General Synod.

2. By the Bishop of the Diocese.

2. By the *Stat. 23 H. 8. c. 9.*

By the Archbishop in case of the assent or neglect of his Suffragan.

IV. The Punishment of a Party convict of Heresie.

Upon Certificate of such Conviction, a Writ *De Hæretico Comburendo* granted, without which they cannot proceed to any temporal Punishment.

But if after Conviction he abjure his Opinion, his life (is) saved.

But if he relapse after Abjuration, then irrecoverable.

§. But (by) the *Statute* of 2 *H. 5. c. 7.* all *Statutes* which introduc'd any Forfeiture stand repealed: Neither did the Common Law inflict any Forfeiture, because the proceeding was only *pro salute animæ.*

Witchcraft.

CP. c. 6.

AT Common Law Witchcraft is punished with death, as Herefie, by Writ, *De Hæretico Comburendo*.

The Statute of 1 Jac. 12. the only Law now in force against it, and divides it into *two Degrees* :

I. Witchcraft in the *first Degree* made Felony without benefit of Clergy, including *four Species* :

1. *Invocation* or Conjunction of an Evil Spirit.

2. *Consult*, *covenant* with, *entertain*, *employ*, *feed*, or reward any Evil Spirit to any intent, (though no act be done thereupon.)

3. *Take up* any *dead Person*, or any part thereof, to be employed or used in Witchcraft, Charm, &c. (though not actually used or employed)

4. Exer-

4. Exercise any Witchcraft, Inchantment, Charm, or Sorcery, whereby *any Person* shall be *killed*, destroyed, consumed, or *lamed* in his or her Body, or any part thereof (which requires the act to be done, viz. laming, consuming, &c.)

These and all Accessary before, to suffer as Felons without Clergy: But Accessaries may be after; but then they have Clergy, because not specially excluded.

II. Witchcraft in the *second Degree.*

1. (To) *take upon them* by Witchcraft, Inchantment, Charm, or Sorcery *to tell where* Treasure is to be found: They that take upon them to do it, though they cannot, yet within this Law.

2. Or where Goods (lost) or stolen may be found.

3. Or to the intent to *provoke* any Person *to unlawful Love*; these Clauses come under the word [*taking upon.*]

Witchcraft.

4. Whereby *Goods or Cattel* shall be *destroyed* (which requires an actual destroying, and not a bare taking upon them.)

5. Or shall use Witchcraft, &c. to hurt any *Person*, though the same be not effected.

The *Punishment* of these,

1. The first Offence, a years Imprisonment and Pillory.

2. The second Offence, Felony.
But this requires :

1. An Actual Conviction and Judgment for the first.

2. The second Offence must be committed after the Judgment for the first.

The like in Forgery, Transportation of Sheep, &c.

But the Consequents upon an Attainder, viz. Corruption of Blood, and loss of Dower : But during life the Lands forfeit.

And Note, a Saving against Corruption of Blood preserves the Descent; and a saving of the Land to the Heir prevents Corruption of Blood.

High

High Treason.

Concerning Offences *against Man* immediately distinguished in their Judgment or Event: Capital, or not Capital.

Capital, either by the Common Law or the *Statutes*; and these either Treason or Felonies.

Treason, either { High Treason,
or
Petit Treason.

High Treason : and this though an Offence at Common Law, yet because there be some mixtures of Introductions of new Treasons by *Statute*, would be considered together.

1. Considering High Treason, it is distinguished into *four kinds*:

1. That which concerns immediately the King, or his Wife or Children.

2. That

High Treason.

2. That which concerns his Officers in the Administration of Justice.
3. That which concerns his Seal.
4. That which concerns his Coin.

Before we come to the Particulars, some things to be generally *pre-mised*.

1. That those that have any such disability upon them, that disables them to act reasonably, cannot commit Treason, *viz. Non compos mentis*; and Infants within the Age of discretion.

And therefore if a Traytor becomes *Non compos* before Conviction, he shall not be Arraigned; if after Conviction, he shall not be executed.

C.P. fo. 4.

An Alien Enemy, committing any hostile act, dealt with as an Enemy: an Alien *any* committing any Treason, a Traytor within the Law.

2. The Statute of 25 E. 3. reduced and settled all Treasons; and by that means all Treasons that were before

before are reduced, and the *Stat.* of 1 *Ma. c. 1.* reinforced the *Statute* 25 *E. 3.* and reduced all new Treasons unto the old Standard of 25 *E. 3.* and so all new Treasons declared between 25 *E. 3.* and 1 *Ma.* abrogated.

3. All Treason includes Felony ; C. Pl. 15. therefore if the Indictment want *proditorie*, a Pardon of all Felonies discharges it.

Now concerning *the kinds* of High Treason.

I. *Compassing* and imagining *the death* of the King, Queen, or Prince, and declaring the same by some open Deed.

I. What (is) a *Compassing* the death?

Declaring by an open act a design to Depose or Imprison the King,
is an Overt act to manifest a compassing of His Death.

Calculating *Nativity de Roy nemy* compassing.

II. What a *King*?

I. A King before his Coronation,
a King

High Treason.

a King within this *Statute*, when the Crown descends upon him.

2. A King *de facto*, and not *de jure*, a King within this Act, and a Treason against him punishable, though the right Heir get the Crown.

3. A Titular King, that is not Regnant; as the Husband of the Queen regnant, not a King within the Act. *Vid.* 1 & 2 Ph. & Ma. c. 10. but the Queen is.

4. The right Heir to the Crown yet not in Possession thereof, is not a King within the Act.

III. What the *King's Wife*?

It extends not to a Queen Dowager.

IV. What the *eldest Son and Heir* of the King within the Act

The second Son, after the death of the eldest, within the *Stat.*

The eldest Son of a Queen Regnant within the *Statute*.

The Collateral Heir-apparent, a Roger Mortimer, 11 R. 2. the Duk of York 39 H. 6. not Son and Heir within this Act.

V. What

V. What an *Overt act* requisite to make such compassing Treason?

1. An Overt act must be alledged in every such Indictment, and proved.

2. Compassing by bare words is not an Overt act, as appears by many temporary *Statutes* against it: 26 H.8.c.13. 1 El.c.6. 13 El.c.1. 14 El.c. 1, &c. but the same set down by him in writing is an Overt act.

3. Conspiring the death of the King, and providing Weapons to effect it, or sending Letters to second it; assembling People to take the King into their power; Lord *Cobham's Case*; writing Letters to a Foreign Prince inciting to Invasion; an Overt act.

4. Conspiring to levy War no Overt act, unless levied, because it relates to a distinct Treason.

II. Treason *levying War* against the King.

1. A conspiring or compassing to levy War, without a War *de facto*, no Treason; but if a War levied, the Conspirators Traytors as well
as

as the Actors: This appears by the *Stat. 13 El. c. 1.* that made such Conspiracy to levy War, Treason during the Queens life.

2. A raising a Force to burn or throw down a particular Inclosure, only a Riot ; but if it had been to go from Town to Town, and cast in all Inclosures, *Bradshaw's Case* ; or to change Religion , or to inhance the Salaries of Labourers , a levying of War, because the End publick.

3. Joyning with Rebels *pro timore mortis* , & *recesserunt quam cito potuerunt*, no levying War. *Oldcastle's Case*.

4. Holding a Fort or Castle against the King's Force, a levying of War.

III. Treason *Adhering to the King's Enemies* , giving them Aid within the Land and without.

1. What *Adhering* ?

1. Giving Aid and Comfort to them.

2. Surrender the King's Castle for reward.

2. What

2. What an *Enemy*?

1. The Subject of the King becoming a Rebel, he that out of the Realm succours him, this not adhering to an Enemy within this Clause.

2. An Enemy coming hostilely into *England*, shall be dealt with as an Enemy, executed by Marshal Law, or ransomed; but a Subject assisting him shall be dealt with as a Traytor.

3. The Scots invading *England* in the Queens time adjudged Enemies, though *Scotland* then in Amity. Lord *Herri's* Case.

3. *Within the Land* or without, how that Foreign Treason shall be tried.

1. At Common Law for a Foreign Treason, the Indictment and Trial must be where the Land lies.

2. By the *Stat. 35 H. 8. c. 2. Dy. 298.* which is yet in force, it may be inquired of and tried in *B. R.* or by Commission in any County where

where the King appoints; the King's Signature may be either to the Commission or the Warrant thereof.

Treason done in *Ireland* is within that *Statute*, *Perrot's Case*.

Trot. Ab.
p. 382.

3. By the *Stat. 28 H. 8. c. 15* Treason upon the Sea inquirable and triable by Commission in any County; at Civil Law it must be before Lord Admiral.

IV. Treason, *Violation of*

1. The King's Wife, extends not to a Dowager.

§. If she consent 'tis Treason in her.

2. The Prince's Wife.

§. The same Law as before:

3. The King's eldest Daughter the living.

Thus far of Treasons that relate to the King's Person and nearest Relations, wherein generally,

1. There must be an Overt act to manifest that Offence.

2. That must be made appear by manifest Proof, and not by conjectures.

3. H

3. He must be lawfully attaint thereof, either by Confession, or by his Peers in his life time.

And therefore if a Person be slain in open War he forfeits nothing, neither can he be attaint in such case, but by Parliament.

2. Thus far of Treasons relating to the King immediately; now follows that which is *Interpretative Treason*.

§. *Killing* the Chancellour, Treasurer, Justice of one Bench or other, Justice in Eyre, or of Assize, or Oyer and Terminer in their place, doing their Offices.

1. This *extends* but to the Persons here named, not to the Lord Steward, Constable, or Marshal, or Lords of Parliament.

2. It extends to these only doing their Office.

3. It extends only to a killing, not a wounding without death.

But by *Stat. 3 H. 7. c. 14.* compassing to kill the King, or any of his Council, made Felony.

3. *Counterfeiting* the Great Seal, or Privy Seal.

1. It must be an actual Counterfeiting: Therefore compassing to do it, no Treason.

2. Affixing the Great Seal by the Chancellor without Warrant, no Treason.

3. Fixing a true Great Seal to another Patent is a great Misprision, but not Treason; nor a Counterfeiting within this *Statute*, 2 *Hen.4.* 25.

4. Aiders and Consenters to such Counterfeiting are within this Act.

5. The Counterfeiting of the Privy Signet or Sign Manual not Treason within this Act, but made so by the *Statute* of 1 & 2 *P.M.* c.11.

V. Treason concerning the *Coin*.

1. *Counterfeiting* the King's Coin.

This was Treason at Common Law, But yet the Judgment was only as in case of Petit Treason; this being but affirmance of the Common Law.

Vide, Si Mr.
de Mint fait
memi allay, &c.
est Treason.
3 H.7.20.

But whereas *Clipping, &c.* is made High Treason by subsequent *Statutes*, the Judgment is to be hang'd, drawn, and quartered, because introductive of a new Law.

Herein considerable:

1. What shall be a *Counterfeiting*? Clipping, Washing, and Filing of Money for lucre or gain, any of the proper Money of the Realm; or of other Realms, allowed to be current by Proclamation, not Within this *Statute*, but made High Treason by *Stat. 5 El. cap. 11.* but no corruption of Blood, or loss of Dower.

Impairing, Diminishing, Falsifying, scaling or lightening the proper Money of this Realm, or the Money of any other Realm

High Treason.

made current by Proclamation, their Counsellors, Consenters and Aiders within neither of the former, but made Treason by the *Stat. of 18 El.* 1. but without corruption of Blood, or loss of Dower.

2. What his *Money*?

This extended only to the proper Money of this Realm:

But now,

1 *Ma. c. 6.* Forging or Counterfeiting Money made *current* by Proclamation, is High Treason.

14 *El. c. 3.* Forging of Foreign Coin, *not current* here; Misprision of Treason in the Forgers, their Aiders and Abettors.

And Note, The *bare forging* of the King's Coin, without uttering, is Treason. 6 *H. 7.*

13.

Mes uttering de faux Money fait deins le Realm sciant ceo destre fals est solment Misprision de Treason, 3 H. 7.

19. *Issint Receiving, Aiding, &c. cestuy que ad counterfeit, Dyer 296.*

Nota,

*Nota, Est grand Misprision, mes
nemy Misprision de Treason, & issint
resolve 1661.*

2. The second offence concerning Money declared Treason, is, if any Person *bringing into the Realm* counterfeit Money.

1. It must be Counterfeit.

2. Counterfeit to the similitude of *English* Money.

3. Brought from a Foreign Realm, and therefore not from *Ireland* barely.

4. Brought knowingly.

5. Brought in, and not barely uttered here: But if false or clipt Money be found in his hands, by the Statute *De Moneta*, if he be suspicious, he may be arrested till he have found his Warrant.

6. He must merchandize therewith, or make payment thereof.

*Certain High Treason made by subse-
quent Statutes in force.*

5 *El. c. 1.* Refusing Oath of Supremacy upon the second tender, Treason, without corruption of Blood.

High Treason.

Extolling power of Bishop of *Rome*
 Premunire, 13 *El. 2. c. 2.* Bringing in
 Bulls, or putting in execution, or re-
 conciling to the See of *Rome* thereby,
 Treason.

Bringing in *Agnus Dei*, &c. Premu-
 nire, 1 *El. c. 1.* Vide *Dyer* 282.

§. 23 *El. c. 1.* Absolving Subjects
 from Obedience, or reconciling them
 to Obedience of *Rome* : Treason in
 Reconciler and Reconciled.

§. 27 *El. 2.* Priest coming into the
 Realm, not submitting in two days,
 Treason. The like for *English* in
 foreign Seminaries.

Petit

Petit Treason.

IS confined by *Stat. 25 E. 3.* to three *Particulars* :

1. Where a *Servant kills* his Master.

This extends to some other Cases:

1. *Servant kills* his Mistress.

2. *Servant kills* his Master's Wife.

3. Where a *Servant*, upon Malice taken during his Service, kills his Master after departure from his Service.

2. *Wife killing* her Husband.

If the Wife and a Stranger kill the Husband, *petit Treason* in the Wife, *Murther* in the Stranger.

If the Wife or *Servant* procure a Stranger to kill her Husband or Master, the *Procurer Accessary* only to *Mur-*

Petit Treason.

der: But if she procure a Servant to do it, Treason in both.

3. *Ecclesiastical Person*, Secular or Regular, kills Superiour.

Note, Aiders and Abettors, and Procurers to Petit Treason are within this Act.

This Act not taken by Equity.

V.C.P. 20.
Crom. 18.
Dal.c.91.H.
5 Car. *Dod-*
dington's Case.

Yet Son kills Father or Mother, it is Petit Treason, receiving Meats, Drink, or Wages.

The *Judgment* in Petit Treason, for a Man to be hang'd and drawn.

Crom. 18.

A Woman to be burnt.

Whatsoever will make a Man guilty or principal in Murther, will make a Man guilty or principal in Petit Treason.

Dal. 1. 91.

But if the Servant kill the Master upon a sudden falling out, this is not Petit Treason, but Manslaughter.

Crom. 19.
Rigg's Case.

If the Servant or Wife be of Confederacy to kill the Husband or Master, and be in the same House, though not in the same Room, they are principals and guilty

ty of Petit Treason, for it is a presence.

Servant tue Mr. per procurement le Feme absent: Il est Petit Treason in Servant, & Accessory al Petit Treason in Feme. 2. Si Estr. fait ceo per procurement Feme ou Servant: est Murder in l' Estr. & Accessory al Murder in Feme ou Servant. 3. Si Estr. fait ceo per procurement & in presence de Feme ou Servant: est Pet. Treason in Feme ou Servant, & Murder in l' Estr', Dy. 128, 254, 332.

Of

*Of Felonies : And, 1. Of
Felonies of the Death
of a Man.*

THus far of High and Petit
Treason.

Now for Felonies, they are either :
by Common Law , or by Statute.

Felonies *by Common Law* : And
they are of four *kinds* :

1. Such as are committed against
the Life.

2. Such as are against the Goods
of a Man.

3. Such as are against the Habita-
tion of a Man.

4. Such as are against the Protecti-
on of Publick Justice.

Felonies committed *against the
Life*, of two Natures.

1. That which is committed a-
gainst his own Life, *Felo de se*.

2. Committed against anothers
Life :

1. Involuntary.

1. *Per*

1. *Per infortunium*, and therein
of *Deodands*.

2. *Per necessitatem*.

In defence of Justice.

In defence of self.

2. Voluntary, without Malice.

With Malice.

Felo

Felo De Se.

I. **T**He *Person.*

1. As in other Felonies, so in this, the Person that commits it must be of age of discretion, and *Compos mentis*; otherwise no Forfeiture: Therefore if a Lunatick, during his Lunacy, a Man distract by force of Disease, or *Non compos*, kill himself, no Felony.

2. As in other Felonies, the death must ensue within a year and a day after the stroke, &c.

2. The *Act* may be voluntary.
Involuntary in some cases.

St. P. C. 16.
Dalt. c. 92.

If *A.* assault *B.* and *B.* falling down with his Knife drawn, *A.* in pursuit to kill, *B.* by haste falleth upon the Knife, *A.* is *Felo de se*, and forfeits his Goods.

But

But if *B.* were standing in his Defence with his Knife drawn, *A.* runs upon the Weapon and kills himself, *A.* is not *Felo de se*.

3. The Conviction.

1. If the Body can be seen, then the Conviction before Coroner, *super visum Corporis*, and not traversable.
2. If not seen, then before the Justices of the Peace, and then traversable by the Executor or Administrator.

In the same manner, if enquired in *B. R.* in the same County, traversable.

4. The Forfeiture:

1. When? By the Conviction.
2. How relating? To the stroke.

Therefore, Villain gives himself a mortal stroke; Lord seisseth Goods; Villain dies; King shall have them.

3. Of what?

Joint things intire, all forfeited, unless in case of Merchants.

Joint things severable, Moiety forfeit.

But

But Joint Chattels in Husband
and Wife, all Forfeit for this Offence
of Husband.

Chance

Chancemedley.

FElony for the death of another,
either involuntary, or voluntary.

Involuntary *per infortunium*;
Ex necessitate.

Involuntary *per infortunium.*

Chancemedley, where a Man doing a lawful act, without intent of hurt to another, and death casually ensues:

As, shooting at Rovers, or at a Bird, or hewing a Tree, and the Hatchet-head flies off.

A School-Master in reasonable Cr. 26. manner beating a Scholar, or Father his Son, or Master his Servant.

Doing a lawful thing that may breed danger, and giving warning;
Justing by command of the Prince.

But if the Act be unlawful, then death ensuing, Manslaughter or Murder.

Shooting at a Deer in anothers C.P.C. 56. Park, the Arrow glanceth and killeth a stander-by, Manslaughter.

Throw.

Throwing stones, or shooting in the High-way, and death ensuing, Manlaughter.

G. P. C. 57.

But if a Man, knowing People passing by in the Street, throw a stone over the Wall, Murther.

Dalt. c. 96.

Playing at Hand-sword, without command of the King, death ensuing, Manlaughter.

So that an unlawful act, without an ill intent, Manlaughter; with an ill intent, Murther.

St. P. & C. 15.

And this causeth forfeiture of Goods; but a Pardon of Course upon the Special Matter found.

Deodand.

Deodand.

BUt there is a Death *per infortunium*, without the default or procurement of another: Fall from a Tree, or by a Horse or Cart; and there the thing that occasions the death is Forfeited and *Deodand*: Wherein considerable,

1. *What Forfeited as a Deodand.*

1. If a Man fall from a Cart, or C. P. C. 3. from a Ship in Fresh water, it is a Deodand: Otherwise in Salt-water,

2. If an Infant under fourteen be slain by fall from a Cart, Horse or Mill, no Deodand; but if slain by a Horse, Ox, or Bull, then a Deodand.

3. If a man kill another with any Sword, a Deodand. Dalt. Inst. c. 97.

2. *When Forfeited, viz.*

When found by Inquisition, Dalt. c. 97.
therefore the Jury ought to find
D the

the price ; and this is before Coroner.

3. The *Relation* of the Forfeiture is to the stroke.

Homicide.

Homicide ex Neceffitate.

THis of feveral forts :

1. In reference to Justice.

2. In defence of his Person, Houfe, Goods.

Homicide ex neceffitate.

§. 1. In reference to Justice, of feveral kinds :

1. In execution of Justice.

2. In advancement of Justice.

Homicide in execution of Justice requires certain Prescripts.

1. That the Judgment be given by one that hath Jurisdiction in the Cause.

If a Justice of Peace give Judgment in Treason, the Execution thereof Murther in Judge and Officer. Dal. c. 98.

But if he give Judgment of death in Trespass, Felony in the Judge, but not in the Officer that executes it.

2. That it be done by a lawful Officer.

Therefore, if a Stranger of his own

own head, or the Judge that gives the Judgment, Execute it, where it is to be done by the Sheriff, Felony.

3. That it be done pursuant to the Judgment.

S.P.C. c. 4.

Judgment to be hang'd, Sheriff beheads him, Felony.

2. Homicide in advancement of Justice in Causes,

{ Criminal.

{ Civil.

1. In Causes Criminal.

Dalt. c. 98.

If a Sheriff or Bailiff, having warrant to arrest a Person indicted of Felony, and he will not obey, or suffer himself to be arrested, the Bailiff kills him, no Felony.

Gro. fo. 27.

The same, if any Person that pursues upon Hue and Cry, or otherwise to arrest a Felon that flies.

C.P.C. 22.

If a Felon arrested break away from his Conductors to Gaol, they may kill him, if they cannot otherwise take him.

But

But in this latter Case there must be a Felony done.

If a Prisoner assaults his Gaoler, and he kill the Prisoner, no Felony.

Rioters, or Forcible Enterers or Detainers, standing in opposition to the Justice's lawful Warrant, and one of them slain, no Felony.

Keeper or Parker may kill Hunters, if they fly or defend themselves. Cro. fo. 28.

Champion in lre de Dēt, ou Combatant in Appelle, excuse in killing the other.

2. In Civil Causes.

Though Sheriff cannot kill a man who flies from the execution of a Civil Process, yet if he resist the arrest, the Sheriff or his Officer need not give back, but may kill the Assailant. C. Pl. c. 56.

§. So if in the arrest and striving together, the Officer kill him, no Felony.

Now touching all the former Homicides, these *things observable* :

1. There must be no Malice coloured under pretence of necessity ; for if it be, it alters the Case , and makes it Murther.

2. The Party that did the Fact must be arraigned , and upon *Not Guilty* pleaded , the Special Matter must be found.

3. Upon this Special Matter thus found, the party is to be dismissed without any forfeiture or pardon purchased.

2. Thus

2. **T**Hus of Homicide *ex necessitate*, in reference to Publick Justice: Others there are that are grounded upon *Private Interest*, and they of two kinds:

1. *Justifiable*, and consequently inducing no forfeiture at all, nor needing pardon.

2. *Excusable*, and yet inducing a forfeiture.

1. *Justifiable*, and inducing no forfeiture, where a Person comes to commit a known Felony.

1. If a man come to burn my Dalt. 6, 98.
House, and I shoot out of
my House, or issue out of
my House and kill him, no
Felony.

2. If a Woman kill him that
assaulteth to Ravish her, no
Felony.

3. If Thieves assault me in the
High-way, or in my House 24 H. 8. c. 5.
to rob me, and I, or my
Servant kill them, no Felony
nor forfeiture.

But if the Assault in my House were not to rob me, but to beat me, &c. there would be only *se defendendo*, and Goods forfeited, and a Pardon of course to be granted, because (they) came not to commit a known Felony ; for it cannot be judged whether he meant to kill me.

Dalt. c. 98.

If one come to enter into my House, claiming Title, and I kill him, Manlaughter.

Crom. 24.

If *A.* enter wrongfully into the House of *B.* riotously and forceably, *B.* and others endeavour to fire the House, *A.* kills, Manlaughter.

Se

Se defendendo.

Homicide *Excusable Se defendendo*, which though it save the Life, yet the Goods are forfeited; this requires these things:

1. It must be an inevitable necessity. C.P.C. f. 56.

In case of a justifiable Homicide, as of a Thief that comes to rob me, or by an Officer resisted in Executing an Arrest, the Party need not give back to the Wall.

But in this Homicide *Se defendendo*, the Party that is assaulted not excused, unless he give back to the Wall. C.P.C. 57.

But if the Assault be so fierce, and in such a place that giving back would endanger his Life, then he need not give back. C. P.C. 57.

A man fights, and falls to the ground, then flying not necessary. Dalt c. 98.

2. It must be in his defence.

If *A.* be assaulted by *B.* and before a mortal Wound given, *A.* gives back till he come to the Wall, and then C.P.C. 56.

then in his defence kill *B.* this is *Se defendendo*.

But if the Mortal wound first given, then Manslaughter.

Dalt. c. 98.
Crom. 26.

If *A.* upon Malice *præpense* strike *B.* and then fly to the Wall, and there in his own defence kills *B.* this is Murther.

But if there be Malice between *A.* and *B.* and *A.* strike first, *B.* retreats to the Wall, and in his own defence kills *A.* this is *Se defendendo*.

Cro. fo. 25.

If Malice be betwixt *A.* and *B.* and *A.* assaults *B.* *B.* retreats to the Wall, and then kills *A.* in his own defence; if it be in the High way he shall be discharged, but if not yet it is *Se defendendo*. *Copston's Case*.

Murther.

Murther.

THus far of Homicide Involuntary.

Homicide *Voluntary* is either:

Ex malitia præcogitata, which is further.

Sine malitia, Manslaughter.

Murther is, when a person killeth another of malice within any County *England*, so he dye within a year and a day.

Q. Who shall be said a *person killing*?

A Man that is *Non compos* kills another, this is no Felony. Dalt.

§. The same for a Lunatick, during Lunacy.

But he that incites a *Mad-man* to kill another, is a principal Murderer.

A man *drunk* killeth another, this Felony.

An *Infant* within age of discretion kills a man, no Felony; as if he be or 10 years old.

But if by circumstances it appear-
eth

Crom. 27.

eth he could distinguish between Good and Evil, it is Felony: As he hide the dead, make excuse &c.

St.PC.c.9.

But in such cases, Execution is prudence respited to obtain a Pardon.

2. What said *Malice*?

It is either implied or expressed.

Implied Malice is collected either from the manner of doing, or from the person slain, or from the perfect killing.

1. Malice implied *in the manner of doing*.

C.PC.52.

Poysoning wilfully any man, implies malice.

Dalt.c.93.

If a man do an act that apparently must introduce harm, and death ensue; as to run among a multitude with a Horse used to strike.

But Note, That if it were with a intention to do harm, then Murder; if without such intention, Man slaughter.

The like of throwing a Stone over a House among many People the intention of doing harm make

it

Murther; want of such intention, manslaughter, because the act unlawful.

For an intention of evil, though not against a particular person, makes malice.

Killing any person without provocation, Murther.

A. comes to rob *B.* *B.* resists and strikes, *A.* kills him, Murther.

A. Distorts his mouth and laughs *B.* who thereupon kills him, Mur-
M. 42, 43 EL. Brame's case.

2. Malice implied *in respect of the person killed.*

If a Watchman or Constable, or any that comes in his assistance, doing their Office, be killed, it is Murther, though the Killer knew him not to be such.
4 R. Hamd. case, Young's case.

If any Magistrate or Minister of Justice, having a lawful Warrant, be killed, doing his Office, it is Murther: as where a Serjeant comes to Arrest,

1. Though in the Night.
2. Though on Sunday.
3. Though upon the Arrest
he

9 Rep. Mat-
kally's Case.

he shew not out of wh
Court, or whose Suit.

4. Though the Proces Err
neous.

5. Though he shew not h
Warrant or Mace, where it
not demanded.

But if the Officer do what is n
warrantable, as break open a Windo
to Arrest, there though slain, Ma
slaughter only. *Pasch. 15 Car. Cool*
Case.

Malefactors come into a Park
the Parker shoots, they fly, he pu
sues, they kill him, Murther in al
for their first entry was with
Malicious intent. *Mich. 17 Jac. Usfra*
Case.

3. Malice implied *in respect of t*
person killing.

A. assaults B. to rob him, B. resist

A. kills him, Murther.

Prisoner by Duress of the Gaol
comes to an untimely end, Mu
ther.

Executing Martial Law in time
Peace, Murther.

2. Malic

2. Malice *Express* considerable,
 1. In the Principal in the first degree, that doth the act.
 2. In the Principal in the second degree, that is present and aiding, or abetting.
 3. In the Accessory before the Fact.

I. In the Principal *in the first degree.*

1. If a person have no particular Malice against any Special person, but comes with a general resolution against all Opposers, if the act be unlawful, and death ensue, it is Murder: As if it be to commit Crom. 20.

Riot, to enter into a Park; Lord Dacre's Case.

2. If there be Malice between *A.* and *B.* and they meet and fight upon that Malice, though *A.* gives first blow, yet if *B.* kill him, it is Crom. 21. Murder.

If there be Malice between *A.* and *B.* and *A.* assault *B.* and after *A.* flies to the Wall, and there in his own defence kill *B.* by some this is Murder; but *Quære.*

If

If there be quarrel between *A* and *B.* and *A.* challenge *B.* *B.* declines it ; but at length upon Importunity and to vindicate his Reputation meets and fights, and kills *A.* this is Murther, *Pasch. 14 Jac. Taverner's Case.*

C.P.C. 55, 57. If *A.* and *B.* fall out upon a sudden and they presently agree to fight and each fetch a Weapon and go into the Field, and one kills the other this is only Manslaughter, because the Blood never cooled: but other wise if they appoint to fight the next day.

Laurence case.
38 El.

A. and *B.* fall out, *A.* saith he will not strike, but will give *B.* a pot of Ale to touch him, *B.* strikes, *A.* kills him, Murther.

If *A.* and *B.* are in Malice, and *A.* challenge the Field, and *B.* refuse to meet, but he saith he shall go to morrow to such a Town, *A.* meets him, assaults him, and *B.* kills him Manslaughter, and no Murther.

Hill. 9 Jac.
Rawly's case.

The Child of *A.* beats the Child of *B.* who runs home to his Father and he runs three quarters of a mile beats

beats the other Child, and he dies ;
Manflaughter.

3. If Malice be not continuing till
the death, no Murther.

A. and B. combat upon Malice, Ciom. 21.
and are parted, and after they meet
and combat upon the sudden, and
one kills the other ; by some not
Murther, because the first Malice
satisfied.

If the party killed had wounded
at the first combat the party slaying,
Quære.

A. and B. are at Malice, and re-
conciled, and after upon a new
Occasion fall out and kill, no Mur-
ther.

4. Though the Malice did *not*
rise so high as death, but intended
only to beat the party ; yet if
malicious, it is Murther if death
ensue.

A Keeper of *Esterly* Park finds a
Boy stealing Wood, bound him to
his Horse-tail and beat him, the
Horse ran away, kill'd the Child,
Murther ; for it was a deliberate act,
Mich. 4 Car. B. R. Holloway's Case.

E

5. The

5. The malice intended to one, *egreditur personam*, and makes the death of another upon that malice, Murther, and qualifies the act in the same manner, as if it had had its due effect.

Dy. 128.

A. having malice at *B.* strikes at him, and misseth, and kills *C.* this is Murther in *A.* and if it had been without malice *præpense*, Manslaughter.

Crom. 101.
Elly's case.

A. having malice to *B.* assaults him, and kills the Servant of *B.* this is Murther in *A.*

9 Rep. Gore's
case.

A. lays poison to kill *B.* and *C.* at misadventure takes it, and dies; Murther in *A.* Contrary, if it had been laid to kill *Rats*; then *infortunium*.

A. and *B.* combat upon malice, *C.* comes to part them, *A.* kills *C.* this is Murther, and *per ascuns*, Murther in both; and if the falling out were sudden, then only Manlaughter in him that kill'd him. *Vide Dyer 128.*
20 *E. 3. Corone 262.*

6. The malice must be of Corporal damage to the party.

2. Prin-

Murder.

51

II. Principals *in second degree*,
that are aiding and abetting.

1. If two or more come together St. P.C.c. 40.
to kill, rob, or beat a man, or to
commit a Riot, and one of them kills
a man, this is Murder in all them
of that party that are present, aiding
or abetting him thereunto, or that
were ready to aid him; though but
lookers on: Otherwise, if he came
there by chance.

2. All are said to be present that 34 H.8. B.
Coron. 172.
M. 17 Jac.
Warnial's case.
Crom. 19.
Dalt. c. 93.
re in the same House, though in
another Room, or in the same Park,
though half a mile distant, and out
of view; therefore if they came to
commit a Felony. such persons aid-
ing or abetting shall be said pre-
sent.

3. *A.* and *B.* fall out, and appoint Dalt. c. 93.
Dy. 128.
the Field; *A.* takes *C.* his Second;
B. takes *D.* his Second; *A.* kills *B.*
this is doubtless Murder in *C.* and
hath been held Murder in *D.* also,
or it is a Compact: But it seems
otherwise.

4. If *A.* and *B.* having malice
in *repense*, meet and fight, and *C.* the

Crom. 100.

Servant of *A.* not acquainted therewith, take part with *A.* his Master, and kill *B.* this is Murther in *A.* but only Manslaughter in *C.*

The same Law if *C.* came in suddenly, and took part with *A.* and kill'd *B.* *Vide Sir Ferdinando Cary's Case, 14 Jac.*

Mes si un vient la per chance, & n'abette, n'est principal, nec accessorial Manslaughter ou Murther, Stamford 40.

3. What Malice in the Accessory before the Fact.

A. commands *B.* to kill *C.* with a Gun, he kills him with a Sword *A.* is accessory to this Murther because the killing was the substance.

But if he command *B.* to kill *C.* and he by mistake kill *D.* this is Murther in *B.* but *A.* is not accessory thereunto.

A. commands *B.* to beat *C.* who beats him, whereof he dies, this is Murther in *B.* and *A.* is accessory because death ensues upon the act commanded.

4. What

4. What *Killing*?

Ptison, Weapon, Gun, Bow, Crushing, Bruising, Smothering, Strangling, Famishing, inciting Dogs.

§. Laying a Sick man in the cold.

Laying an Infant in an Orchard under Leaves, and he stricken with a *Kite*.

A man keeps a Beast used to strike knowingly, and ties it not up, the Beast kills a Man, Felony by some, by others not, but a great Misdemeanour, 3 E. 3. Cor. 311. St Dal. c. 93.

5. What the *person killed*?

It must be a person *in rerum natura*.

If a Woman quick with Child take a Potion to kill it, and accordingly it is destroyed without being born alive, a great Misprision, but no Felony; but if born alive, and after dies of that Potion, it is Murther.

The like, if it dies of a stroke given by another in like manner.

§. Counsel before the birth to destroy it, and after the Child is born C.P.C. c 7.
Dal. c 93.
contra.

Ibid.

born destroyed accordingly , the Counsellor is Accessory.

6. What a place *within the Realm* ?

C.PC.c.7.

Stroke and death *in partibus transmarinis* not punishable at Common Law, but before the Constable and Marshal.

Stroke and death upon the Sea inquirable before the Admiral , or according to the *Stat.* of 28 *H.* 8. c.13. But Stroke upon the Sea, and death within the Body of the County, not punishable at all.

If the Stroke in one County, and the death in another, the party shall be indicted where the death happened.

An Accessory in the County of *A.* to a Felony committed in the County of *B.* the Accessory after Certificate of the Conviction and Attainder of the Principal , may be Arraigned upon an Indictment in the County of *A.* where he was Accessory. *Stat.* 2 *E.* 6. c. 24. *Vid. Formam Processus inde in B. R. C.PC. cap 7. Overbury's Case.*

7.The

7. The party must die *within the Year and the Day* of that Stroke, or Poison,&c.

E 4 *Man-*

Man slaughter.

KILLING another upon a sudden falling out, or provocation, or unjustifiable act, Man-slaughter.

I. What a *sudden falling out*?

C. PC. c.8.

Two combat and part, and presently come together and fight; or one presently fetcheth a Weapon and killeth the other, or they presently fetch their Weapons, and go into the field, and one kills the other, Man-slaughter.

Divers Rioters enter into anothers House forcibly, and eject the People; afterwards they being in possession, the party ejected, with twenty more, come in the Night to the House, endeavour to fire it, and one within shoots and kills one of the assailants; ruled to be Man-slaughter, because their entry and holding with force illegal; and not Murther, because a sudden provocation.

So *A.* claims Title to the house of *B.* *A.* attempts to enter and shoots at the house; *B.* shoots out and kills *A.* adjudged Manlaughter.

Two fall out and fight, and one breaks his Sword; a Stranger standing by sends him another, and he kills therewith, Manlaughter in both. Dalt. c. 94.

2. What a *sudden provocation*?

Two strive for the Wall, and one kills the other, Manlaughter.

3. What *unlawful act*, whereupon Death ensuing will make Manlaughter?

If the unlawful act be deliberate, and tend to the personal hurt of any immediately, or by way of necessary consequence, death ensuing, is Murder.

But if either such deliberation or intent of personal hurt be wanting, Manlaughter.

Two play at Foils, and one kills the other, Manlaughter. Sir *John Chichester's Case*, 11 H. 7. 23. *Vide Kell.* 108, 136. *Wrasling*, & *un tue autre.*

A.

A man throws a Stone at another, which glanceth and killeth another, Manſlaughter; and not Murther, becauſe no malicious intent to hurt; not *per infortunium*, becauſe doing an unlawful act.

There is a particular Manſlaughter, wherein Clergy is ouſt, by the *Stat. 1 Jac. c. 8.* wherein,

1. He that is ouſted of Clergy by that *Statute*, muſt be eſpecially indicted purſuant to the *Statute*.

2. It extends to him that actually gave the Stroke, not to thoſe that are preſent.

3. Need not conclude *contra formam Statuti*.

4. Although the Indictment be Special upon the *Statute*, yet the Jury may find general Manſlaughter. *Hill. 23 Car. B. R. Page's Caſe.*

A. Newgat. rep. 16 Car. 2. A man whips his Horſe in the Street to make him run ſpeedily, and the Horſe runs over a Child, and kills him; Manſlaughter: But another whips the Horſe, whereby he ſprings out, and runs over a Child, and kills him;

per

per infortunium. Nota, Indictment de Murther per ceo que est per infortun' sur non culp' pled' Jury poet trover luy non culp' si soit Coroners Inquest, que trove ceo per misfortune & le party conust ceo. Prettye's Case.

Larceny.

Larceny.

WE come to Offences Capital, which refer to *the Goods* of any Person, viz. *Larceny*, which is of two kinds :

{ Simple Larceny,
 { Mixt and complexed Larceny

Simple Larceny of two kinds :

Grand Larceny, of the value of 12 pence.

Petit Larceny, under that value.

Simple Larceny, a felonious and fraudulent taking away by any person of the meer personal Good of another, not from the person, nor out of his house, to the value of 12 pence.

I. Wha

I. What shall be said a *Felonious taking*? Imports two things:

1. A Taking necessary; the Indictment must be *Cepit*; if it be *felonice Abduxit Equum*, not sufficient.

If a person find Goods lost, and C.P.C. convert them, though the Conversion were *animo furandi*; yet no Felony.

If a man hath a *bare charge* of Goods, Felony may be by him committed: As a Butler that hath charge of Plate, Shepherd of Sheep; the like of him that hath a *bare special use*, as the Guest that hath Plate set before him.

But he that hath a *possession by delivery*, cannot thereof commit Felony.

A Carrier hath Goods delivered to him, and he carries them away, no Felony.

A. lendeth his Horse to a Stranger, who rides away, no Felony.

A Clothier delivers Yarn to a Weaver

Weaver to weave, he carries it away, or imbezels it, no Felony.

But this hath two Exceptions :

1. If the Privy be determined, then it may be Felony.

A. delivers a Pack or a Tun of Wine to a Carrier, he opens it, and take out Goods or Wine, *animo furandi*, Felony.

So if A. deliver Goods to B. to carry to a certain place, he carries it to the place appointed, and after takes it *animo furandi*, Felony.

2. By Stat. 21 H. 8. c. 7. whereby if a Servant goes away with the Goods of his Master, delivered to him above the value of 40 shillings; herein,

1. Extends not to Apprentice, nor Servants within eighteen years.

2. Requires a Delivery.

If one Servant deliver the Goods to the other, this is delivery by Master.

If the Master deliver an Obligation, or deliver Cattel to sell, and the Servant receive the money and depart with it, it is no Felony: The like if he had gone away with the Obligation.

3. He must go away with it.

Wastfully consuming, &c. thereof, is no Felony.

4. Now by the *Stat. of 1 E. 6. c. 12.* he may have his Clergy.

5. He must be a Servant at the time of the delivery, and going away; therefore for imbezelling after Master's death, *Stat. 33 H. 6 c. 1.* gives remedy.

6. If a Servant receive his Master's Rents, and go away with them, not within the *Statute.*

If a man, seeing a Horse in the C.P.C. 67. pasture of the Owner, having a mind to steal him, obtains a Replevin, and thereby hath the Horse delivered, this is a Felonious taking.

If

Crom. 34.

If *A.* feloniously take my Horse and *B.* feloniously takes him from him, *B.* may be appealed or indicted as of a felonious taking from me
 §. Stat. 33 H. 8. c. 1. False token.

Un prist feme de I. S. ove ses bien countre le volunt, est Felony: Contr si feme prist les biens le baron & al ove estr' de sa bone volunt. 13 Aff. c. Iffint si feme covert prist biens le baron ou eux dona al estr' que eux impor. nest Felony. Abridg. Aff. 63.

II. What a Carrying away ?

C.P.C. c. 47.

A Guest takes Sheets out of the Bed; brings them into the Hall with an intent to carry them away, but is apprehended before this; a Carrying away.

A. takes the Horse of *B.* with an intent to steal him, but is apprehended before he can get out of the Pasture; this Taking away.

Crom. 33.

A. kills my Sheep, strips them, carries away their Skins, Felony; if he pull off their Wool.

III. *By whom?* and who such a person, as may commit Larceny.

An *Infant* under Fourteen years Dalt. 104. may commit Larceny; but prudence to respit Judgment; yet one under Fourteen burnt in the Hand. *Presidents.*

A *Feme covert* by her own act may commit Larceny, and in such case the Husband may be Accessory to the Wife in receiving her; but not *converso*.

But she cannot feloniously take her Husband's Goods; and though she so take her Husband's Goods, and deliver them to a Stranger, yet no Felony in the Stranger.

If Husband and Wife do both a Dalt. 104. Felony, this is Felony in both, and both arraigned for it.

Nota, Books old and latter, and *Practise, contra.*

If the Wife commits Murther by coercion of her Husband, Murther in both; but if theft, no Felony in
F her;

her; but a bare Command excuseth her not.

2. But if a *Servant* commit Theft by coercion of his Master, yet it is Felony.

IV. What meer *personal Goods*?

Dalt.c.47.

1. If they are in the Realty, or annexed thereunto, no Larceny: As Corn or Grass growing, Apples on Trees.

§. Stealing a Chest of Charters, no Felony, though the Chest above value.

Taking Lead off a Church no Felony: Otherwise if he leave it a while, and after come and take it.

Taking an Infant Ward, no Felony.

2. If they are of a base Nature, as Mastiffs, Dogs, Bears, Foxes, Monkeys, Ferrets, or their Whelps, there can be no Felony of them; but of Hawks reclaimed Felony may be.

V. What

V. What said the Goods of another.

1. He that hath a Special property, as a Bailiff, &c. they are his goods *pro tempore*. A. bails Goods to B. and after to the intent to charge B. steals them from him, Felony in A. 21 H. 7. Kel. 70. Cloth in maines Tylor.

2. He that takes the Goods of a Dal. 163. Chapel in time of Vacation, indict-
ble *quare bona Capellæ*; so *bona Pa-*
ochianorum, *bona mortui*, or *bona*
ignoti, &c.

So to steal the Shroud of a Person C.P.C. 478
uried; and it shall be *bona Executo-*
rum. Vid. *Tamen contra*; 15 Jac.
Tottingham's Case.

But taking of Treasure trove,
Wrecks, Waifs and Strays before
discovery, no Felony.

Taking an Obligation Felony,
because in action.

Taking Fish in a River no Felony;
but Fish in a Net, Trunk, or Pond,
Felony, because not at their natural
liberty:

liberty : So of old Pigeons out of the House.

Where a man hath a Property only *ratione loci*, or *privilegii*, in things *feræ naturæ*, as Coneys or Deer in my Ground, Park or Warren, no Felony.

Mes fil ne conu-
sant d'estre
tame, n'est Fe-
lony.

V. Mag. Chart.
201.

But if reduced to tameness, and fit for food, as Deers, Coneys, Cranes, Partridge, Pheasants, he that stealeth them, knowing them tame, committeth Felony.

So of Swans marked and pinioned, or Swans unmarked if tame, kept in a Mote, Pond, or private River.

Where a man hath a Property *ratione impotentia* in things wild by Nature, as young Hawks in the Nest, young Pigeons in the Nest, Felony thereof.

Taking of Eggs of Hawk or Swan out of the Ground of another, no Felony, but punishable by *Statute*.

But taking any thing *domitæ naturæ*, as Duck, Hen, Geese, Turkeys, Peacocks, or their Eggs; or Domestick

mestick Beasts , as Horses , Mares, Colts,&c. or their young, Felony.

VI. Where this shall be said a *Felonious taking.*

If *A.* steal Goods in the County Crom. 34.
of *B.* and carry them into the Coun- V. 4 H. 7.5.
ty of *C.* he may be appealed or in-
dicted in the County of *C.* for Lar-
ceny, but can be indicted of Rob-
bery only in the County of *B.*
Only in the former Case the *Stat.*
of 25 *H.8. c.1.* ousts them of their
Clergy, if they were not to have had
Clergy if arraigned in the County
of *B.* where the Robbery commit-
ted.

*Si Gueſt priſt Sheets hors de leſt
feloniouſly, & eux import in hale, &
la ſur fear de purſuit relinquish eux,
Felony. 27 Aſſ. 39.*

VII. Of the *value* of Twelve pence, or above.

1. *Nota*, That in caſe of Grand Westm. 1. c. 15.
Larceny it muſt be above the value 21 Jac c. 6.

of Twelve pence ; and if it be but of the value of Twelve pence, or under, it is Petit Larceny.

2. If two steal Goods to the value of Thirteen pence , this is Grand Larceny in both.

3. If one person at several times, at one time steal Four pence, at another Six pence , at another Three pence, in all amounting to above Twelve pence, from the same person, all these put together in one Indictment, amount to Grand Larceny ; and Judgment of Death.

4. If a man be Indicted of stealing Goods to the value of Ten shillings, and the Jurors find Specially, as they may, the value but Ten pence, 'tis but Petit Larceny, and no Judgment of Death.

And Note, Petit Larceny is Felony, though not of Death ; and for this he shall forfeit Goods , and be subject to Whipping , or other Corporal punishment. *Issint si fugam fecit furt biens.* Coron. 106.

Robbery.

Dal. 2. 101.
Crom. 36.
St. P. C. c. 24.

Robbery.

COMPlicated or mixt Larceny, which hath a farther degree of guilt in it.

1. For that it is a Taking from the Person.

2. For that it is a Taking out of the House.

1. *Taking from the Person.*

1. Where the Person is put in fear, and then 'tis Robbery.

2. When not put in fear, and then 'tis Larceny from the Person.

Robbery is a felonious and violent taking away from the person of another Mony or Goods to any value, putting him in fear.

1. *Violent and putting him in fear*; the words of the Indictment run, *violenter & felonice*, and that distinguishes him from a Cut-purse.

2. *Taking away.*

1. An assault to rob without any taken, is no Felony.

If a Thief, with or without Weapon drawn, bid the party deliver his Purse, and he doth it, this is a taking to make it Robbery.

Crom. 3 R.

If a Thief command to deliver his Purse, and he deliver, and the Thief finding little in it, deliver it back, this is Robbery.

C. P. C. 16.

If a Thief compel the True man by fear to swear, to fetch him a Sum of Mony, which he doth accordingly, and the Thief receives it, it is Robbery.

If the True man's Purse be fastned to his Girdle, the Thief cuts the Girdle, the Purse falls to the Ground, no Robbery; but if the Thief take up the Purse, though he let it fall again, Robbery, though he never take it up more.

All that come in Company to rob, Principals, though one only actually do it.

Crom. 34.

A. B. and *C.* assault *D.* to rob him in the High way, but rob him not, for that he escaped: *A.* rides from the rest, in the same High way, and robs *E.* out of view of the rest, and came

came back to the rest, and for this B. and C. arraigned and hanged, though assented not, because they all came to the end to rob. *Pudsey's Case.*

3. Taking *from the Person.*

If the True man, seeking to escape, casts his Purse into a Bush, or let fall his Hat, if the Thief take it, Robbery.

Taking a thing in my presence, is a Law a taking from the Person.

If one take or drive my Cattel *Dalt. c. 101.* out of my Pasture in my presence, this is Robbery, if he make an assault upon me, or put me in fear.

But if he take any thing from my *Dalt. ibid.* person, without putting me in fear *Dyer 224.* by assault or violence, no Robbery; and the Indictment runs, That he took it from the Person violently and feloniously, putting him in fear. *Dalt. ibid.*

4. Of what *value* soever.

Though under Twelve pence. *C.P.C. c. 16.*

*Mes in forein County in tiel case
petit Larceny, car n'est Robbery la.
Jac. More's Rep.*

Now though Robbery and simple

ple Larceny are both Capital, yet they differ in these Respects:

1. The Principal and Accessory before are ousted of Clergy, but not in Simple Larceny.

§. Stat. 23 H. 8. c. 1. 1 E. 6. 12 25 H. 8. 3. 4 & 5 Phil. & Ma. c. 4
Nota, speaks of Robbery in or near the High-way.

2. In the form of the Indictment:

An Indictment of Robbery supposeth an Assault, beating and wounding, and taking from the person *felonice*; or at least assault and putting in fear, *felonice & violente cepit à persona*: Other Indictments though of a taking from the person yet not *violenter*.

3. In case of other Thefts, though from the person, not Felony of Death, unless it exceed Twelve pence. But here it is Felony of Death never so small.

Larceny from the Person.

L Arceny from the Person *without putting in Fear*; which may be either by picking the Pocket, or putting the Purse, which is supposed to be done *clam & secrete à persona*.

In this Case by the *Stat. of 8 El.c.4.* the Indictment pursue the *Statute*, which is secretly without the knowledge of the party, *clam & secrete*, is ousted of his Clergy.

But if it be under value of Twelve *C. P.C. c. 86*
pence, then it remains Petit Larceny, *Crom. 103.*
before; for the *Statute* did not enter the Offence, though it took a Privilege.

Larceny from the Person, which is either *clam & secrete à persona*, nor with putting in Terror, nor so laid in the Indictment, nor so found by the Jury, Clergy. *Dyer 224. 17 Jac. Har-*
n's Case.

Larceny.

Larceny from the House.

L Arceny receives another aggravation, when it is taken *from the Habitation* of a man.

Per Stat.

23 H. 8. c. 1.

Robbing any person in their dwelling-house, the Owner, his Wife, or Children, or Servants being within, and put in fear, ousted of Clergy in case of Conviction, together with Accessories before, by *Stat. 23 H. 8.*

c. 1.

Felonious taking of Goods to the value of Five shillings out of any Dwelling-house or Out-house, tho' no person within, oust of Clergy by 39 *Elc. 15.*

These have a Mark upon them as Larcenies complicated, and so oust of Clergy. *Vide infra Clergy.*

Piracy.

Piracy.

TO this we may add Piracy and Depredation upon the Sea.

This at Common Law convicted, C.P.C. c. 49. Petit Treason, if done by a Subject.

But this alter'd by *Stat. 25 Ed. 3.*

Since that *Statute* an Offence triable by the Civil Law till 28 *H. 8.* 5.

The *Stat. 28 H. 8.* alters not the Offence; but it remains only an Offence by the Civil Law: and therefore a pardon of Felonies doth not discharge it: but it gives a Trial by the course of Common Law:

1. It extends not to the Accessories: But if the Accessory were at Sea, triable by the Civil Law; if at Land, by no Law: For *Stat. 2 & 3* 6. extends not to it.

2. It extends not to Offences in Creeks or Ports within the Body of County, because punishable by the Common Law.

3. Though

3. Though it give forfeiture of Life, Lands and Goods, yet no Corruption of Blood.

4. *Paine fort & dure*, in case of standing Mute.

Burglary.

Burglary.

WE come to the Offences
against the dwelling or
habitation; and that of two kinds:

1. Burglary.
2. Arson, or Burning.

Burglary by the Common Law is,
where a person in the Night-time
breaketh and entreth into the Man-
n-House of another, to the intent
to commit some Felony within the
same, whether the Felonious intent
be executed or not.

I. What shall be said in the *Night*?

By some, after Sun-set and before
Sun-rising it is Night. *Dalt.c.99.*

But it seems, that so long as the C. PC. c.14.
Countenance of a person may be
discerned, it is Day. *Coron.293.*

II. What

II. What *Breaking and Entering*?

The Entering into a House by the Doors open, is a Breaking in Law but here not sufficient without an actual breaking: Therefore if the Door be open, or Window be open and the Thief draw out Goods thereby, no Burglary.

But if the Thief break the Window, draw the Latch, unlock the Door, break a Hole in the Wall these are Breaking.

And as there must be a Breaking so there must be an Entry:

Setting the Foot over the Threshold:

§. Putting the Hand, or a Hook or a Pistol within the Window, or Door:

Turning the Key where the Door is locked on the inside:

§. An Entry.

In some cases Burglary without actual Breaking.

Diver

Divers come to commit Burglary, and one does it, the rest watch at the Lanes end, Burglary in all.

A Thief goes down a Chimney to Crom. 30. rob, Burglary.

Thieves having an intent to rob, C.P.C. 14. raise Hue and Cry, and bring the Constable, to whom the Owner opens the Door, and when they come in, they bind the Constable and rob the Owner, Burglary.

A Thief assaults the House, the Owner for fear throws out his Mony, it seems not Burglary, but only Robbery.

A Thief gets in by the Doors Dalt. 99. open in the day, lies there till night, then robs and goes away, no Burglary: But if he break open the door to go out, Burglary.

The Servant opens the Window Dalt. ubi supra. to let in a Thief, who comes in and steals; Burglary in the Stranger, but Robbery in the Servant.

If *A.* enter into the Hall by the Doors open, the Owner retires to a Chamber, and there *A.* breaks in, this is a Breaking and Entering.

If Thieves enter into an House through a Hole made there before, no Burglary.

Trin. 16 Jac.

Edmond's case.

A. lies in one part of the House, B. his Servant in another, between them a Stair-foot-door latched, the Servant in the night draws the Latch, and enters his Masters Chamber to Murther him, Burglary.

III. What *Mansion House*?

The Church a Mansion House within the Law.

§. The Out-buildings, as Barns Stables, are parcel of the Mansion House, and Burglary may be committed in them.

Nota, L'use ore est, si soit un Barne ou Stable disjoyned at any distance from the House, n'est Burglary.

Burglary may be committed in a Mansion house, though all persons be out upon occasion.

So if a man hath two Houses, and sometimes live in one, sometime in another.

A Shop parcel of a Mansion-house.

A Chamber in an Inns of Court, where a person usually lodges, a Mansion house.

But a Booth is not, and therefore remedy especially provided *per Stat.* 5 E.6.c.9.

But an Indictment *quod fregit clausum ad ipsum interficiendum*, no Felony, for no Mansion house.

A. leases to B. a Shop, parcel of his House, to work in, where B. works in the day, which is broken, Ruled not Burglary, because severed *per Lease. Trin. 17 Jac.*

IV. With *Intent* to commit some Felony.

If the House be broken and entered with an Intent to commit a Trespass, as to beat the Owner, no Felony. C.P.C. c. 14.

If with intent to commit a Rape, by force no Burglary, because no Felony at Common Law; but this seems otherwise, though the Felony be not done.

Burglary.

The Indictment runs, *Burglariter*
& felonice domum, &c. fregerunt vel
intraverunt ad ipsum, &c. interficien-
dum.

And by the *Stat. of 18 El. c. 6.*
Clergy taken away in all Burglary.

Arson.

Arson.

B*urning* is Felony at Common Law, by any that shall maliciously and voluntarily burn the House of another.

Burning.

Setting Fire on a House, without burning it, or any part of it, no Felony; but if part of the House be burnt thereby, it is Felony by Common Law.

Maliciously.

A. intending to burn only the House of *B.* thereby burns the House of *C.* this is Felony; and he may be Indicted, That *ex malitia præcogit'* he burnt the House of *C.*

A. maliciously burns his own House, to the intent to burn others, but none else but his own burnt, ruled no Felony, but a great misdemeanour; upon which set in the Pillory, and bound perpetually to Good Behaviour. 9 Car. B. R. *Haines's Case.*

Mes si le meason d'autre p. t. est
combure, est Felony.

The *House*.

In-set House, or Out-set House.

If parcel of the Mansion House,
as Stable, Mill house, Sheep-house,
Barn, and no Clergy.

§. But burning of a Barn, not
parcel of a Mansion-House, if it hath
Corn or Hay in it, Felony, otherwise
not.

But Felon not oust of Clergy,
unless part of the Mansion House or
Barn with Corn.

Burning the Frame of an House
by 37 *H.* 8. attempting to burn a
stack of Corn, by 3 *§* 4 *E.* 6. made
Felony, but both Repealed 1 *Ma.*

But in *Northumberland*, *Cumber-*
land, *Westmerland*, and *Durham*,
Felony to burn a stack of Corn by
43 *El.c.* 3.

Nota, The Indictment of Burglary,
Domum Mansionalem; of Arson
only, *Domum*.

Breach.

Breach of Prison.

NOW we come to those Felonies that are the *hindrance of amesning a Felon to publick Justice*; And they are of three kinds in reference to the person that causeth it:

1. In the party himself:

{ Breach of Prison.

{ Escape.

2. In the Officer or Person that permits it; and then,

{ Voluntary.

{ Involuntary.

3. In a Stranger, that is Rescue.

1. *Breach of Prison.*

At Common Law it seems all breach of Prison, Felony; but by Stat. 1 E. 2. *nullus de cætero, qui prisonam fregerit, subeat Judicium vitæ vel membrorum pro fractione prisonæ, nisi causa, pro qua capt' & imprisonat' fuerit, tale Judicium requirit.*

And herein these things are considerable:

1. Who may *Arrest* or Imprison?
 2. What a *Prison*?
 3. What *breaking* a Prison?
 4. What a *Cause* that requires a Judgment to make this Felony?
-

Arrest.

Arrest.

WHo may Arrest or Impri-
son? This is either,

1. By a private Person.
2. By a publick Officer.
1. Arrest *by a private Person,*
and that two kinds :

1. Either commanded and
enjoyed by Law.
- 2: Or permitted and al- C.P.C. f. 53.
lowed by Law.

Arrest commanded by Law.

1. Persons present at the commit-
ting of a Felony must use their en-
deavours to apprehend the Offender, St. P.C. c. 29.
otherwise they are to be fined and
imprisoned.

Hence it is that if a Murther be
committed in the day in a Town
not inclosed, the Township shall be
enclosed; if in a Walled Town, be
enclosed Night or Day, the Town shall be
enclosed [if Offender escape.] Stat.
H. 7. 1.

So

So it seems if one strike another dangerously, though death hath not yet hapned.

C.P.C.25.

2. Upon *Hue and Cry* well levied every man may and must arrest the Offender upon whom it is levied, by *Stat. Winchester*: And want of pursuit thereof is punishable by Fine and Imprisonment.

The manner of levying *Hue and Cry* is, where a Felony is committed or a dangerous stroke given, respect to the Constable, declare the Fact, describe the party and the way he is gone, who thereupon is to raise the Town, be it by Night or Day, and to give the next Constable warning and he the next.

3. In aid of an Officer that has a lawful Warrant *in fact*, or in Law to arrest a Malefactor.

Dalt. fo.249.

And in these cases it seems it is in the power of such private person to break the House, if upon demand he cannot be admitted to take the Offender. 7 E.3.16.

.Coke Jur.
Courts 177.

Videtur, 1. Sur felony fait & suspicion ascun poit arreste. 2 E. 4.

2. *Sur Arrest de mesner al Common Gaol*, 20 E. 4. 6. *ou deliver al Constable*, 10 E. 4. 1.

2. A *permissive* Arrest by a private person:

If a felony in Fact be committed, and a private person suspect another upon a probable cause, he may be arrested, though in truth innocent: And these may be *Probable Causes*;

Hue and Cry levied;

§. Company with the Offender;

§. Goods in his Custody;

§. Living vagrantly;

§. Common Fame.

But upon such suspicion he cannot break open the Door of a House, but may enter the Door being open. C. Jur. Courts
179.

The person Arrested by either of these means by a private person, must be brought to the Constable; and if Constable be not to be found, Dalt. fo. 414. to a Justice; and in case of a Felony known, put in the Stocks or Common Gaol till he be brought to a Constable.

2. Arrest

2. Arrest *by a publick Officer*, with out Process of Law.

Nota, Whatsoever a private person may do in this case, an Officer as private person may do.

Now these *Officers*,

1. *Constable*.

If complaint be made to a Constable of Felony committed, or of dangerous Blow given, though the party not dead; or in case there be an assault upon the Constable, or in case of any other breach of the Peace, the Constable may imprison the party in the Stocks, in the Gaol, or in his House, till he can bring him before a Justice of Peace.

But if it be a bare breach of the Peace, unless it be in his view, he cannot Arrest the party; but complaint must be made to a Justice of Peace: For the Constable is but Conservator, not Justice of Peace, unless a Felony be done.

If a Constable see an Affray, and the Malefactors fly into another County before arrest, he may pursue

ue them and Arrest them there,
nd then he must bring them before
Justice of that County where Ar-
ested.

But if the Escape was after Ar-
est, then he may retake them in
another County, and bring them to
the first.

He may break open Doors to Dalt.c.78.
take an Offender, where Felony
committed, or a dangerous Wound
given.

2. By a Justice of Peace, who
upon complaint may issue out his
Warrant to apprehend the party:

1. A General Warrant to search C. Jur. Courts
for Felons or stolen Goods, not ^{177.}
good.

2. If a Justice hath cause of suspi-
cion, he may arrest as a common
person, not as a Justice.

3. Upon complaint of a Felony
committed, and where doubt may
be of apprehending the Offender,
with assistance of the party suspect-
ing, he may grant his Warrant to
the Constable to apprehend the
party, but the party suspecting
ought

ought to be present, because it is h
Arrest.

But by virtue of such Warrant
Doors cannot be broken up.

4. But at the Sessions the Justice
may award a *Capias* against the
Person indicted, and by virtue
thereof the Sheriff may break open
Doors.

A party being apprehended
such Warrant, is either to be Com
mitted, Bailed, or Discharged.

The *Commitment* by a Justice ought
to be to the Common Gaol, by the
Stat. 23 H.8. c.2. and the *Mittin*
ought to be,

C. M. Car. 99.
Stat. 3 H.7. c.3.

1. Under Seal.

2. Contain the Cause.

3. Have an apt Conclusion, and
there to stay till delivered
by Law, otherwise the W
rant void.

C.P.C. c.100.
fo. 209.

And Note, That a person Com
mitted for Treason, Felony,
other Crime, cannot be discharged

ill indicted and acquitted; or *Ignominiam* found, or discharged by Proclamation, or by the Kings Bench upon *Habeas Corpus*.

Bail.

Bail.

IN order to the consideration of Arrests and Escapes, here fit consider of Bail and Mainprize cases of Felony.

1. What Bail is ?
2. In what cases ?
3. By whom ?

1. *Bail*, are Sureties taken by Person authorized, to appear at a day and to answer and be justified by the Law.

The difference between Bail and Mainprize is, That Mainprisors are only Surety, but Bail is a Custody and therefore the Bail may release the Prisoner if they doubt he will fly, and detain him and bring him before a Justice ; and the Justice ought to commit the Prisoner to the discharge of the Bail ; or put him to find new Sureties : The like may be done by the Justices in case of insufficient Bail.

If a Justice of Peace take insufficient Bail, and the party appear not, the Justice finable by Justice of Gaol Delivery.

The *sufficiency* of the Bail in respect of their number, two at least; and those Subsidy men in case of Felony.

And in respect of the sum, Forty Pounds at least.

Bail is either in a certain sum; or *corpus pro corpore*, in which case the Offender not appearing, the Surety shall not be Executed, but only fined. 29 Aff. 44.

2. In what Cases?

1. *Generally*: To refuse Bail where the party ought to be bailed, the party offering the same is finable, as Misdemeanour:

§. And admitting Bail when it ought not, is punishable by the Justice of Gaol Delivery by Fine, or punishable for a negligent Escape at Common Law, *de quo infra*.

2. *Particularly*: At Common Law Bail in all Cases but Homicide: but now the *Stat. Westm. 1. c. 15*.

H

directs

directs in what Casesailable, and what not?

At this day, in all Offences below Felony, the party accused isailable, unless

1. Ousted by that *Statute*, or some other *Statute*.

2. Unless Judgment be given.

Crom. 154.

If a Person be brought before a Justice, if it appears no Felony be committed, he may discharge him; but if a Felony be committed, though it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him.

The cases of Felony wherein the parties are notailable, are

1. In respect of the *hainousness* of the Offence.

1. In a Charge of Treason against the King's Person:

2. Counterfeiting the Seal:

Dalt. c. 114.

3. Falsifying Mony.

4. Arson, or burning Houses.

5. In a Charge of Homicide.

6. In case of a Charge of Murthe. Justices of Peace cannot bail, but the

the King's Bench may; but do not in discretion, for the *Stat. Westm. 1.* extends not to that Court. Dal. c. 114.
V.C. *super Stat.*

2. In case of Manſlaughter, though it be but *Se defendendo*, and ſo appear to the Juſtices of Peace, they cannot bail the party accuſed:

1. If he confeſs the Fact upon Examination: Dal. c. 114.

2. If taken with the manner, if apparently known or manifeſted that he killed another.

But if it be a *Non liquet* that he is the Perſon, and the Charge but Manſlaughter, there it ſeems they may bail.

So if he have given a dangerous ſtroke, he may be bailed till the party dead.

But ſuch Bailment where Manſlaughter or other Felony committed, muſt be

1. By two Juſtices, one of the *Quorum*.

2. After Examination, &c.

And theſe be all the perſons excluded from Bail ſimply, in reſpect of the nature of the Offence: Hence 3 H. 7. c. 9.
St. 1 & 2 Ph.
& Ma. c. 13.

H 2

1. All

C. West. 1. c. 15.

1. All Accessories before or after any Offence bailable; but if the Principal be attainted, and Accessory indicted, he shall not be bailed until he hath pleaded to the Indictment.

St. P. C. c. 18.

2. Persons indicted of Larceny before the Sheriff, if of good Name.

3. Imprisonment for a light suspicion, if of good Name.

4. Indicted or accused of petty Larceny only.

5. Appellee of Approver after death of Approver.

6. Accused for Trespass, for which a man ought not to lose life or member, if bail not taken away by a subsequent Stat.

Dalt c. 114.
fo. 304.

And hence also a party indicted for Burglary or Robbery may be bailed.

2. As bail is ousted in some cases, in respect of the greatness and consequence of the Offence charged, so it is in respect of the *Notoriety* of the Offence: For bail is, when *Stat indifferenter*, whether the party be guilty or no: but when that indifferency

ferency is removed, the Offender otherwise bailable is become not bailable.

1. If a Person be Attaint by Utlary of any Felony, yet if the Defendant comes in and pleads in avoidance of the Utlary, be it in Appeal or Indictment, the King's Bench may bail him. Westm. 1. c. 15

2. If he be convict by Verdict or Confession of any Felony, he is not bailable. Dalt. c. 1. § 4.

But if a man be convict of Manslaughter *Se defendendo*, the Justices of B.R. or Gaol Delivery, or Special Writ may bail him, but not Justices of Peace: So if he have Charter of Pardon. Dalt. § 83.

3. He that becomes an Approver cannot be bailed.

4. He that Abjures cannot be bailed.

5. He that's taken with the manner not bailable: And consequently neither he that's taken freshly upon Hue and Cry. *Bridge's Case.* Justice of Peace fined 40 *l.* for bailing such

6. He that breaks Prison, not bailable.

7. Open and notorious Thieves, not bailable.

But he that is taken for a light Suspicion, bailable.

But if the Presumption be strong, or the Defamation great, the Justices may refuse to bail him: This lies in discretion.

8. Those that are Appealed by Provers; unless,

1. The Prover die.

2. The Prover waive his Appeal.

3. Unless he be of good Name.

And the Reason hereof, because when the Approver appeals another, he confesseth himself guilty, and therefore induceth a presumption of guilt in another.

But this concerns not Justices of Peace, because no man can become Approver before them; because they cannot assign a Coroner; but they may take the Confession by way of Evidence.

But

But a bare Indictment or Appeal did not induce such a presumption that may hinder the bailing of a Person otherwiseailable. V. Stat. Westm. 1. c. 25.

But in Appeals of Death the S.P.C. 18. Court in discretion admit not the Defendant to bail, but upon weighty cause.

If the party be acquitted within the year upon Indictment, he is not to be discharged, but remanded or bailed at discretion, that an Appeal may be prosecuted against him.

3 H. 7. c. 1.

3. Who may take bail, or bail Offenders?

Bail was taken either *virtute brevis*, or *ex officio*.

1. Bail taken *virtute brevis*, that was either General or Special.

The General Writs.

Homine replegiando.

Habeas Corpus in the King's Bench.

Writ of Mainprise; this was directed to the Sheriff, commanding him to deliver by the Mainprise of

H 4

Twelve

Twelve, the party indicted before him.

St.PC.77.

But now by *Stat. 28 E. 3. c. 9.* these Inquests before Sheriff are taken away, and consequently the Writ of Mainprize.

Special Writ, as where a party is convict of Manlaughter *Se defendendo*; a Special Writ to certifie the—

2. Bail *ex officio*.

1. The *King's Bench*, who have a higher Power than any other Power.

1. They may either in case of an Original Suit, by Indictment or Appeal before them; or upon an Indictment or Commitment returned to them, by *Habeas Corpus* or *Certiorari*, bail where another Court cannot:

In case of Murther. *B. Mainprize*, 60, 63, &c.

In the cases prohibited by *Stat. Westm. 1. c. 15. V. Cook ibid. verb. Viscounts, & autres verb. ne soient replevisable.*

2. *Justices of Gaol Delivery*, who may bail in cases where Justices of Peace

Peace cannot, if it be of a thing within their cognizance.

§. As a person convict of Man-
laughter *Se defendendo* ;

§. Or a person convict of Man-
laughter, that hath a Pardon to
plead.

3. Justices of Peace.

§. 1. They cannot Bail in any case,
but where they have cognizance of
the cause ; therefore if taken upon
process of Rebellion out of *Chancery*
they cannot bail.

2. The *Statutes* that give power
to Justices of Peace to bail in case
of Felony, are 3 *H.7.c.3.* 1 & 2 *Ph.*
1 *Ma. c. 13.* upon which two kinds
of Bailments.

1. Upon the first Accusation, and
before Examination, and that doubt-
less must be done,

1. By two Justices, whereof
one of *Quorum*.

2. After Examination taken Cr. 156.
concerning the Offence.

2. After Commitment : And
though some Opinion be that he
may be bailed by one Justice, yet it
seems

seems otherwise ; for the *Stat. c. 1 R. 3.* that gave power to one stands repealed by *3 H. 7.*

3. After Indictment and Process thereupon issued in case of Trespass or Misdemeanour, or Penal Statute not prohibiting Bail, he may be bailed by two Justices, whereof one of the *Quorum* ; and by some by one Justice and thereupon may grant a *Superseas* to the *Exigent*. But it seems that it holds not upon a Process upon Indictment of Felony. *Quære.*

4. The Sheriff, Bailiff, or Officer which was of Indictment before them : But these are removed from that power, as it seems by the *Stat. 28 E. 3. c. 9.*

1 E. 3. 4. c. 3. whereby they are not to make Process, but to remove the same to the Sessions of the Peace:

Rumpe

Rumper Prison.

NOW having considered the Persons that may Arrest and ail, it makes way to consider the offence against such Arrest or Imprisonment, by breaking such Prison, &c. And herein ensues the second consideration.

2. What a *Prison* within this *Statute*?

1. The Stocks.
2. The Prison of a Lord of a Franchise.
3. The Custody of any that Lawfully arrests, or the House of the Constable, or other person where detained.
4. The Church, where a person abjuring is.
5. The Prison of the Ordinary, which is now ousted, *Stat. 23 H. 8. c. 11.*

3. What

3. What a *breaking* ?

If the Prison be fired without the privity of the Prisoner, he may lawfully break it to save himself.

2. If a Gaoler do voluntarily permit him to escape, Felony in the Gaoler, not in the Prisoner; but negligent, Felony in the Prisoner, and Misdemeanour in the Gaoler.

3. If Prisoner under Custody be rescued, or Prison broke by Strange without his procurement, no Felony in the Prisoner.

4. Going out the Doors open, is Felony; for the *Statute* requires an actual breaking.

4. *Nisi causa ; tale judicium, &c.*

1. If *A.* mortally wound *B.* and he break Prison and *B.* then die, no Felony.

2. If a Felony made by a subsequent *Statute*, and an Offender committed therefore, break Prison, Felony.

3. Con

3. Committed for suspicion of Felony, yet if a Felony done, breaking Prison Felony.

4. If the Offence for which the party was committed appear not by Matter of Record, necessary a Felony done, else breach of Prison no Felony.

But if it appear by Matter of Record; and the party taken by *Capias*, he break Prison, Felony, though no Felony done.

5. If Felony was done, yet breach Prison no Felony, unless a lawful *attimus, de quo supra*.

6. The Indictment for the breach must be Special, that it may appear was committed for Felony.

5. *Tale Judicium requirit.*

1. Breach of Prison turns into Felony only, though the party were committed for Treason.

But if a Prisoner break a Prison wherein Traytors are, to let out the Traytors, this is Treason.

2. A man imprisoned for Pet Larceny, or *Se defendendo*, break Prison, no Felony.

3. If a Prisoner break Prison, he may be Arraigned of that before he be convict of the first Felony.

V.Dalt. 331.

But a Gaoler permitting a voluntary Escape shall not be Arraigned till the Prisoner be first Attaint; for the Prisoner be acquit, the Escape dispunishable.

Escap

Escape in the Party.

Nota, If a Person escapes before Arrest, not punishable in him for Felony; but for the Flight, he forfeits Goods when presented.

In case a man slain in the day, if the Offender Escape, Township amerced. *Vide supra.*

Issint si soit dangerousment Wound,
H 7 c. 1. *Et si soit vill immune ser'*
merce, soit ceo in jour ou nuit, 3 E. 3.
oron. 299. Stat. Winton, cap. 4.

Escape.

*Escape in the Officer, or him
that makes Arrest.*

THis is either in case of Arrest
1. By a Stranger.
2. By an Officer.

If a *Stranger* Arrest a man for Felony, or suspicion thereof, and deliver him over to four others, and they receive him and let him go at large, this is an Escape in both; for the first man should have delivered him to the Constable; and the latter should not have let him go at large.

And the same Law seems to be for an Escape by a Stranger that hath a Prisoner in his Custody, as for an Officer in case of Escape voluntary or negligent.

Escape

Escape by an Officer.

Escape of an Officer.

1. *Negligent.*

1. Bailing a person not bailable, through ignorance, by one that hath power to bail, a negligent Escape.

But it seems if done by a Gaoler a voluntary Escape; because he hath no such power.

2. The ordinary punishment of a Negligent Escape.

1. Of a party Attaint,
100 l.

2. Of a party Indict,
5 l.

3. Of a party not Indict,
at discretion.

3. For Insufficiency of the Gaoler, the Sheriff must answer for Negligent Escapes.

4. A Gaoler *de facto*, though not *de jure*, must answer for Escapes.

5. If after a negligent Escape the Gaoler retake him upon fresh Suit before he be punished, it excuseth.

If the Constable bring a person to Gaol, the Gaoler refuseth him, the Vill shall be charged, and Gaoler fined.

2. Voluntary Escape.

§. 14 E. 3. c. 10.

1. Hath the same Crime that the person permitted to Escape stood committed for, *viz.* Treason or Felony.

2. But this is in the immediate person that permits it; and therefore though civilly the Sheriff must answer for Offences of Gaoler, yet not criminally.

3. There must be a Felony really done, and a Commitment by a lawful Warrant.

4. If within the year the Prisoner be acquitted upon Indictment, yet voluntary Escape is punishable as Felony.

Felony, because Wife intituled to her Appeal.

5. The Escape if voluntary, punishable *ut supra*, though the Prisoner were not indicted. Dalt. fo. 335.
Dyer 99.

Rescue.

1. **A** Hindrance [of a person to be arrested that has committed Felony is a Misdemeanor, but no Felony.

2. But if the party be arrested and then rescued, if the arrest was for Felony, the Rescuer is a Felon; if for Treason, a Traytor; because they are all Principals.

But he shall not be arraigned to the Principal attainted; and if the Principal die before attainder, the Rescuer shall be fined and imprisoned.

3. There must be a Felony really done, and a lawful Commitment.

N. Rescue hors de custody de Court stable, &c. est Felony, licet ne fuerit amesne al Gaol.

Felonies by the Statute. C.Pl.C.c.4.

3. **H** *En.7.cap.14.*
 Imagining and *conspiring*
 to kill the King, or any of his
 Council.

§. Clergy not taken away.

1 *Fac.c.12.*

§. *Witchcraft, de quo supra.*

§. 25 *H. 8. c. 6.* Revived by 5 *El.*
c.17.

Buggery with Man or Beast.

§. Without benefit of Clergy.

Debet esse Penetratio, as well as
Emissio.

In this and Rape *carnaliter cognovit.*

13 *E.1.c.34.*

Rape: This was Felony at Common Law; then by *Stat. Westm. 1. c. 13.* made but a Misdemeanour; then by this *Statute* restored to Felony again.

And hence it is that it is not in-
 quirable in a Leer, because though
 no Felony; yet it lost its nature by
W.1.c.13. C. *sur ceo Stat.*

Nul Appeal done al party.

18 E. 3. Coron. 169.

If the Woman be under ten years then though she consent, yet by Stat. 18 El. c. 6. it is a Rape; if above ten years, if she consent not, a Rape though she consent after.

But in such case of a subsequent consent, the Stat. 6 R. 2. c. 6. gives the Appeal to the Husband, if none to the Father, &c.

Clergy taken away by Stat. 18 El. c. 7. upon Conviction by Verdict, or Confession, or Utlawed.

Cestuy que aid in Rape est Ravistor
11 H. 4. 13.

3. H. 7. c. 2.

Taking a Woman against her Will and marrying her, Felony.

1. Such Maid, Widow, or Wife Must have Lands, Tenements, or Goods, or be Heir Apparent.

2. She must be taken against her Will.

3. She must be married or defiled.

4. Extends not to taking a Ward or Bondwoman.

Nota

Nota, The taking away in one County, and marrying in another, indicted where married; and they may enquire of the forcible taking.

2. Privy to the Marriage, but not to the Force, not Guilty. 3. Marriage with Consent not excusing so long as she is under the Force, 13 *Car. Fulwood's Case*.

All Accessories before or after, made Principals by this Act.

Clergy taken away by *Stat. 39 El. c. 2.*

5 *H.4. c. 5.*

Malicious cutting out Tongue, or putting out Eyes, Felony.

Clergy not taken away.

Extends not to cutting off Ears.

8 *H.6. c. 12.*

Stealing, carrying away or avoiding Records, Felony. And

The Judges of either Bench enabled to hear and determine the same.

Accessories before made Principals.

9. Clergy allowable.

5 *H.4. c. 4.*

Multiplication of Gold or Silver,
Felony.

1 *H. 7. c. 1.*

Hunting unlawfully in Forests,
Chases, or Warrens with painted
Faces by Night, and Rescuers, *viz.*
other than the party arrested, Fe-
lony.

31 *El. c. 4.*

Imbezelling the King's Armour,
&c. Felony.

Qualifications:

1. Ought to be impeached within
a year.

2. Offender loseth Lands but du-
ring life.

3. No Corruption of Blood.

4. Wife loseth not Dower.

5. Defendant admitted to proof.

3 *Jac. c. 4*

Subjects passing Sea to serve fo-
reign Prince, not having taken Oath
of Obedience :

No Corruption of Blood :

Offender may have Clergy.

Articuli.

Articuli super Chartas, c. 2.

Purveyors Felons in certain Cases:

§. They may have Clergy.

39 *El. c. 17.*

Wandering Souldiers, Felons in certain cases.

§. Excluded of Clergy.

18 *H 6. c. 19.*

Souldiers retained, as is prescribed in the Act, departing from their Captains without license.

§. 2 *E. 6. c. 2. ad idem.*

§. Clergy excluded.

1 *Jac. 12.*

Marrying a second Husband or Wife, the former living, Felony: Except Cases following;

1. The Man under fourteen, or the Wife under twelve at time of first Marriage, and not agreeing after first Espousals, may marry a second Husband or Wife.

2. A Man or Wife absent above seven years, second Marriage no Felony: If beyond Sea, though notice of

1 Jac. 11.

of life: If in *England*, then without notice.

3. After a Divorce, though *à mens & thoro* only.

4. After a Nullity declared of the former Marriage by Ecclesiastic Court,

Offenders have Clergy

1 Jac. c. 31.

5. For going with a Plague Ship but this discontinued.

14 El. 3. 20.

Gaoler compelling Prisoner Duress to become Appellor, Felony whether the Appellees be acquitted or not.

3 H. 5. c. 1.

Coining, or bringing in Gold half pence, Suskins, or Dodkins.

6. And 2 H. 6. c. 9. payment of Blanks,

Offender hath Clergy

17 E. 3. n. 15.

Transportation of Silver, or Transportation of false Money, made lony,

Offender hath Clergy

18 H. 6. c. 15.

Exp

Exportation of Wool or Woolfells, other than to the Staple of *Calais*.

37 *E.3. 19.*

Stealing Falcons, &c. or concealing the same after Proclamation, Felony.

Offender hath Clergy.

3 *H.6. c.1.*

Congregation of Mafons to prevent *Statutes* of Labourers :

§. But this Obsolete by the *Statute 5 El.* the Acts to which it relates are repealed.

27 *El.c.2.*

Receiving, retaining, or maintaining Jesuit or Popish Priest knowingly,
Clergy excluded.

35 *El.c.1.*

Felony refusing to make Abjuration, or after Abjuration not to depart, in some case,

Clergy excluded.

1 & 2 *Ph. & M.c.4.*

Egyptians above fourteen years, remaining here a Month.

§. And 5 *El. c. 20.* takes away Clergy.

39 *El.*

39 *El.c.4.* 1 *Jac.c.7.25.*

Dangerous Rogue adjudged to the Gallies; and returning without license, Felony:

§. But Offender hath Clergy.

§. But branded Rogue, Felon, and no Clergy.

5 *El.c.14.*

Forging a Deed after a former Conviction.

C.P.C. §172.

If a man be convicted or condemned of publishing a forged Deed, and after he forge a Deed, this is Felony.

If the Offence were after a former but before Conviction thereof, Felony.

Clergy ouster

8 *El.c.3.*

Sending Sheep beyond Sea after former Conviction.

Clergy allowed

33 *H.6.c.1.*

Servants after decease of the Master, riotously spoiling Goods &c.

Offenders shall have Clergy

21 H. 8. 7.

Servants imbezelling Goods of
their Masters delivered to them,
Felony ;

But the *Statute* of 27 H.8. c. 17.
that took away Clergy , being Re-
pealed by 1 E.6.c. 12. they may now
have Clergy.

22 H. 8. c. 11. 2 & 3 Ph. & Ma.
.19.

Cutting Powdike, Felony,
Offender hath Clergy.

43 El.c. 13.

Detaining persons in *Cumberland*,
&c. against their Will , and giving
or receiving Blackmail,&c. Felony,
Without Clergy.

Mispri-

Misprisions.

NOW we come to Offences Criminal, but *not Capital* and those of two kinds :

1. Offences by Common Law :
2. Offences against special *Statutes*.

Offences by *Common Law* *non Capital*, are either greater Offences or lesser :

Greater ; and those come under name of *Misprisions*, which again are of two sorts :

Negative, in not doing that they ought, or of Omission.

Positive, in doing some great Misdemeanour they ought not.

Misprision

Misprision of Treason.

The Negative Misprisions.

Misprision of Treason.

All Treason includes Mis-^{2 R. 3. 9.}
 rision: The Concealing of any ^{C.P.C.c. 3.}
 Treason, is declared Misprision only
 by the Statute of 1 & 2 Mar.c. 10. *que*
duce auxi misprision.

But this in case of bare know-
 ledge; for if knowledge and Assent,
 is Treason: and though the Treason
 be by Statute, yet the concealing
 thereof is Misprision of Treason.

Every man therefore that knoweth
 Treason, must with all speed reveal
 to the King, his privy Council, or
 other Magistrate.

He that receives and comforts a ^{C.P.C.c. 64.}
 Traytor knowingly, be it a Counter-
 iter of Coin or other, is a Principal
 Traytor, and not only guilty of Mis-
 prision. *Abingdon's Case* against the
Opinion in Dyer 296. Conier's Case.

The

The Judgment in case of Misprision of Treason is Imprisonment during life, forfeiture of Goods, forfeiture of profits of Land during life.

Nota, Si un conust un que ad counterfeit Coigne, & ne luy discover, Misprision de Treason. Mes si seulement utter counterfeit coigne scia ceo estre counterfeit n'est Misprision de Treason, mes serra Fine & Imprison. Issint resolve a Newgate 1661.

Misprision

Misprision of Felony.

2. **M**isprision of Felony,
is either by Common Law,
or by Statute.

By the Common Law a concealment of a Felony, or procuring of the concealing thereof.

The Punishment.

1. If a common Person, Fine and imprisonment.

2. If an Officer, as Sheriff, Coroner, Imprisonment for a year, and ransom at the King's pleasure, by *stat.W.1.c.9.*

By the *Stat.3 H.7.c.1. 33 H.8.c.6.* the knowing of an unlawful Assembly, and not discovering it within 4 hours.

Concealment of Jurors, *vide Stat.*

K

Theft.

Theftbote.

3. **T***Heftbote*, which is more than a bare Misprision of Felony, and is where the Owne doth not know the Felony, but takes his Goods again, or other Amends, not to Prosecute.

But taking the Goods again barely, no offence, unless he favour the Thief.

The punishment hereof is Ransom and Imprisonment.

Misprision

Misprisions Positive, or of Commission.

1. **D**iscovery by one of the C. PC. c. 46.
Grand Inquest of the persons Indicted, or Evidence against them, Misprision, punishable by Fine and Imprisonment, but no Felony, nor Treason.

2. A person dissuading Witnesses C. PC. c. 64.
from bringing in Evidence against a Felon is no Accessory, but a great Misprision, punishable by Fine and Imprisonment.

3. Reproaching a Judge, assaulting an Attorney against him, or abusing a Juror that gave verdict against him; a great Misprision, punishable by Fine and Imprisonment.

4. Rescuing a Prisoner from the Bar of the Courts of *B. R. Canc. B. C.* or *Exchequer*, a Misprision for which the party shall lose his Hand, Goods, Profits of Lands, during Life, and perpetual Imprisonment.

5. If a man strike sitting the four Courts at *Westminster*, in the presence

sence of the Court, the like Judgment

6. If in presence of those Courts, or before Justices of Assize or *Oyer & Terminer*, a person draw his Sword upon any Judge or Justice, though he strikes not, or strike another, like Judgment.

7. By *Stat. 33 H.8.c.12.* striking in the King's presence, drawing blood; loss of Hand and perpetual Imprisonment, Fine and Ransom.

8. By *Stat. 14 El. c.3.* forging of Money not current, Misprision of Treason.

9. Stranger uttering false Money made within this Realm, knowing it Counterfeit, 3 *H.7.10.*

10. A Lord of Parliament, departing from Parliament, 3 *E.3.*

Maibem.

Maihem.

ANd hither we may refer *Maihem*, which though it be a particular Crime, for which Appeal lieth, yet it is not Felony of death.

Cutting off the Hand, or striking C. CP. c. 40.
out a Tooth, *Maihem*; but not cutting off the Ear.

The Judgment is only Fine and Damages; and therefore if recovery in Trespass, it is a good bar in Appeal of *Maihem*.

K 3 *Offences*

Offences not Capital.

Offences of an Inferiour nature :
They are either such as are
committed by an Officer :

Neglect of Duty,

Bribery,

Extortion.

Or such as refer to a common
person, without relation to Office,
and those reducible to three kinds :

1. Breaches of publick Peace, and
therein,

1. Of Affrays.

2. Of Riots.

3. Of Forcible Entries.

4. Barrettries.

5. Riding armed.

2. Deceits and Cozenage.

3. Nufances.

Decay of Bridges.

Decay of High-ways.

Inns and Alehouses.

Breach

Breach of the Peace.

A F F R A Y,

If Weapons drawn, or stroke given or offered ; but Words no Affray : Menace to kill or beat, no Affray ; but yet for safeguard of Peace, Constable may bring them before Justice.

In Affrays considerable,

1. What a *private Man* may do?

Private persons may stay Affrayers till heat over, and deliver them to Constable.

If person hurt another dangerously, private person may arrest the Offender, and bring him to Gaol or next next Justice.

2. What by a *Constable*?

1. Affray in presence of a Constable, he ought to do his endeavour to suppress it, otherwise finable.

2. If an Affrayer fly to a house, or if made in a house, Con-

K 4

stable

stable may break open house to preserve Peace , or take the Offender.

3. If in Affray Assault be made upon the Constable, he may strike again , or imprison Offender.
4. Constable may in such case imprison, till he find Surety of Peace.
5. But it seems if Affray past, and not in view of Constable, he cannot imprison without Warrant of the Justice, unless Felony done, or like to be done.
3. What by a Justice ?
 1. In his presence , the same Power that a private person or Constable, and may imprison till Surety of Peace found ; the like upon Complaint.
 2. If dangerous hurt, Justice may imprison till appear whether the party die or live, or bail the party.

The former better discretion.

Riot.

Riot.

When above the number of Two meet to do some unlawful act, and act it; but if they meet and act not, an unlawful Assembly, in power of Justices to suppress them, *H.4. c.7.*

A man for safeguard of his house against Malefactors or Trespassers, may assemble his Friends for his defence.

But he cannot assemble to prevent a beating threatned in his presence.

Riot recorded by one Justice upon view traversable; by two, not, because pursuant to the *Statute*.

Forcible

Forcible Entry.

Forcible Entry must be either
Manu forti,

Furnished with unusual Weapons
 Menace of life or limb.

Breaking open door :

Contra, it seems, if door open
 latched,

Ejecting forcibly the possessors

Cum multitudine gentium, one may
 commit a Force, three at least
 Riot.

Forc

Forcible Detainer.

Menacing the Possessor to go out on pain of loss of life or limb.

Unusual Weapons or Company.

§. Refusing to admit the Justice to come in to view the Force.

Detainer with Force justifiable, where party in possession Three years:

§. But though his Possession lawful, yet if within the Three years actually removed, though restored to the Justices, enables not a Detainer with Force.

But if the Three years Possession has been by Force, then the last forcible Detainer punishable, and orders not Restitution.

If a Disseisee within the Three years make lawful Claim, this an interruption of his Possession.

Restitution.

*Restitution.*1. *By whom?*

1. Justices *B. R.* may rest upon Indictment removed before them.

2. One Justice of Peace cannot restore upon an Indictment before them; nor Sessions of Peace, upon Indictment found at Sessions.

3. It seems Justices of Gaol Delivery or Oyer and Terminer, cannot Restore.

2. *How?*

Upon View.

Upon Indictment?

Must be sufficient,

Adhuc extra tenet.

If Erroneous, may be superseded by the same Justice before Execution. After it is Executed, then Re-restoration in *B. R.* upon Indictment quashed.

Restitution *stayed*.

By *Certiorari*.

By quashing Indictment.

**By pleading thereunto, which
is nevertheless in discretion.**

Barretry.

Barretry.

Riding Armed.

Going Armed.

Vid. Stat. 20 R.2.c.1. 7 R.2.c.1
2 E.2.c.3. Stat. Northampton.

Nusance

Nuisances.

Bridges Publick.

Are not chargeable upon a particular Person, but *Ratione terræ*.

But of Common Right, repairable by the whole County.

The manner of Repairing directed
Stat. 22 H. 8, c. 5.

High.

High-ways.

High-ways: Provisions,
 1. For their *Enlarging* and
 removing Trees within 200 Foot of
 either side.

13 *E. 1. c. 5.*

5 *El. c. 15.*

2. For their Amending *vide* the
Stat.

5 *El. c. 13.*

29 *El. c. 5.*

2 & 3 *P. M. c. 8.*

The *Charge* of Repair of High-ways lies of common right upon the Parish wherein they are, unless,

1. A Special Prescription cast upon another.

2. Unless the Owner of the Land in which they are, inclose it, then must be cast upon the Owner.

But they that have Ditches on either side ought to scour them, 8 & 7. 5.

Inns.

Ale-houses.

Bawdy-houses.

Gaming-houses.

L

Common

Common Inns.

1. **A** Ny person may erect
Common Inn, so it be no
ad nocumentum.

1. In respect of their multitude
when there are enough an-
cient Inns before.

2. In respect of the inconve-
nience of the place or situ-
ation.

3. In respect of Disorders ther
permitted.

All which are Common
Nusances, and may be
presented and fined.

2. He that erects a Common Inn
and *refuses to entertain* Guests, may
be Indicted and fined for the same.

3. If a Common Inn, contrary to
Statute, suffer persons to tipples ther
as Ale houses, he may be compelle
to be bound, or may be suppress
as Ale houses, or may be indicted at
Sessions.

Ale-houses.

SEe for *Ale-houses*, the suppressing of them, and the punishing of Tipling in them, 5 *E. 6. c. 25.*
 1 *Jac. c. 9.* 4 *Jac. c. 5.* 7 *Jac. c. 10.*
 21 *Jac. c. 7.* 1 *Car. c. 4.* 3 *Car. c. 3.*

An Ale-house-keeper suppressed, according to the *Stat. of 5 El. 6. c. 25.* by two Justices, whereof one of the *Quorum*, cannot be allowed but in open Sessions.

An Ale-house-keeper suppressed for the Offences 7 *Jac. c. 18.* 21 *Jac. c. 7.* for suffering Tipling, or 7 *Jac. c. 10.* for selling less than is there directed, or 21 *Jac. c. 7.* for continuing drinking in another Ale-house, or 21 *Jac.* for being drunk, cannot be licensed in three years, and if he be, such License void.

5 & 6 *E. 6. c. 25.*

None to sell Ale, &c. unless licensed in open Sessions, or by two Justices, one of the *Quorum*.

Persons licensed to be bound by
 Recog. not to keep unlawful Games,
 and for using good Order.

Recog. return next Quarter Sessions.

Process upon Recognizance at Sessions.

Persons unlicensed keeping Ale-house imprisoned by two Justices, one of the *Quorum*, for three days, and till Recog. given not to sell Ale.

Certificate of such Recog. Conviction, and Fine 20s.

1 *Fac. c 9.*

Ale men, Inn-keeper or Victualer suffering Inhabitant to sit *tippling*, forfeit 10 s. to the Poor.

Conviction before one Justice, &c. by two Witnesses.

Penalties levied by Constables, and Churchwardens by distress and sale within six days.

In default of distress. Offender committed till payment *per* Justice.

Constable, &c. neglecting to levy or certify default of distress, forfeits 40 s.

4 *Fac.*

4 Jac. c. 5.

Person drunk forfeits 5 s. to be paid within a Week after Conviction, to the Poor: If neglect, levy by Distress, by Warrant from Justice: If not able to pay, commit to Stocks for six hours.

Constable neglecting duty, forfeits 10 s. to the use of the Poor.

Any person *sitting tippling*, dwelling in the same Parish, forf. 3 s. 4 d. to Poor, proved before Justice, levy *per* distress, and for want of distress commit *per* Justice to House of Correction.

Second Offence, bound to good Behaviour.

Constables, &c. bound by Oaths to present Offences.

Punishment within six Months.

21 Jac. c. 7.

Former act extend to Foreigners, as well as Inhabitants.

One Witness suffice to convict, or view of Justice.

Ale house suppress, not licensed for three years, *per* Stat. 7 Jac. c. 10.

I *Car. cap. 4.* Former *Statute*
extend to Inn keepers and Ta-
verns.

Offences

*Offences not Capital by
Statute.*

Offences not Capital more particularly by Statute.

Forgery by Stat. 5 El. c. 14.

*Perjury, and Subornation thereof,
5 El. c. 9.*

Champerty, Embracery and Maintenance, 32 H. 8. c. 9.

Ingrossing, Forestalling, and Regrating, 5 E. 6. c. 14.

Salt Victual within Statute.

Apples and Cherries, &c. no Victual.

Mault seems not, but Corn and Grain expressly Victual by 5 Ed. 6.

A Stranger, or Subject, bringing Victual into the Realm, may sell them in gross, but the Vendee cannot; neither may any Merchant buy within the Realm, and sell in gross.

Attempting to enhance the price of Merchandize, a kind of Forestalling.

Selling Corn in the Sheaf, unlawful.

Matters of Religion.

Reviling the Sacraments, Imprisonment, Fine and Ransom, 1 *E.6.c. 1. Repealed*, 1 *Ma.c.2.* revived 1 *El.c.7.*

2. Not coming to Church to hear Common Prayer, by 5 *E.6. c.1.* subject to Church Censures.

Nota 3 *E. 6. c. 1.* settled a Book of Common Prayer; Injoyned the use: Refusing to use it, using other, or praying it, Imprisonment for six months for first Offence, twelve months for second, during life for third.

5 *E. 6. c. 1.* Alters the Prayers; it applies the Penalty to the new Book.

Nota, Repeal 1 *Ma.* that Repealed 7 *ac.c.25.*

1 *El. c. 2.* Enacts the use of the Book of 5 *E.6.* with some Alterations.

Any that,

1. Refuse to use it:

2. Use another form:

3. Deprave

3. Deprave it.

§. If Spiritual, six Months Imprisonment first Offence, one year Imprisonment second Offence, Deprivation third Offence.

If Lay, first Offence 12 Months Imprisonment, second Offence during life.

Depraving Book of Common Prayer, first Offence 100 Marks, second Offence 400 Marks, third Offence forfeit Goods and Imprisonment during life.

8 *El. c. 1.* touching Consecration of Bishops.

Concerning repair to Church.

1 *El. 2.* Every Sunday and Holyday, *sub pœna 12 d. per diem.*

§. 23 *El. c. 1.* 20 l. *per mensem* for absenting; and if absent two Months upon Certificate, bound to good Behaviour.

29 *El. c. 2.* Conviction of Recusancy.

35 *El. c. 1.* Penalty of dissuading from Church, holding of Convocations, commit to Prison without bail until Conformity.

Nonconformity within three months after Conviction, shall abate the Realm.

Not departing, or returning, Foreign without benefit of Clergy.

Submitting, discharged of the Penalty by this Act.

Relapsing loseth the benefit of Submission.

Ten pounds *per mensem* for every person retaining or relieving Recusant after Notice.

Cap. 2. Recusants not to remove Miles from dwelling.

1 Jac. c. 4. Conformable Heir of Recusant discharged: Third part charged of forfeiture.

Penalty of sending Children to seminaries.

1 Jac. c. 4 & 5. Penalty for refusing oath of Supremacy.

1 El. c. 1.

5 El. c. 1.

Of Obedience,

3 Jac. c. 4.

7 Jac. c. 6.

King's Bench.

NOW we come to consider the *Proceeding* against a party for Felony, and therein,

1. Concerning the *Jurisdiction Court* wherein Proceedings are to be had in Capital Causes; and those are principally,

1. The King's Bench.
2. Justices of Gaol Delivery.
3. Justices of Oyer and Terminer and Assizes.
4. The Sheriff and Coroner.
5. The Lord Steward of Household.

The *King's Bench*, the Supreme Court of Criminal Jurisdiction. It is a Court of Oyer and Terminer, Gaol Delivery, and Eyre, in that County where it sits.

9 Rep. *Santhar's Case.*

By the coming of the King's Bench into any County, during the sitting thereof in that County, all power and proceedings of Commissioners of Oyer and Terminer is suspended.

But a Special Commission of Oyer and Terminer bearing *Teste* in the term may be granted ; and King's Bench may adjourn , and then they may sit.

Where the King's Bench proceeds upon an Offence committed in the same County, there need not fifteen days between the *Teste* and Return the *Venire facias* : But if they proceed upon a Cause removed by *9 Rep. San-*
torari, they must have fifteen *char's Case.*
 days.

Gaol

Gaol Delivery.

*C. Jar. Courts
sub hoc titulo.*

1. **T**He Justices of Peace ought to deliver the Indictments not determined unto those Judges, and they may Arraign any person in Prison upon them.

2. They may take Indictments against any person in Prison, and may Justices of Oyer and Terminer, and herein they have a concurrent Jurisdiction.

3. They may take a Pannel returned by the Sheriff without Precept.

4. They may deliver by Proclamation persons suspected, where there is no Evidence to indict them.

5. May award Execution of persons in Prison outlawed before Justices of Peace,

6. May assign Coroner to an Appeal, and make Process against an Appellee in a Foreign County.

7. May punish those that undo bail Prisoners, *Stat. de Finibus*, 12 Ph. & Ma. c. 13.

8. May

8. May deliver the Gaol of persons committed for High Treason.

9. May receive Appeals by Bill against persons in Prison.

10. By *Stat. 9 E. 3. 15.* must send their Records into the Treasury of the Exchequer at *Michaelmas*.

11. Others may be added to the former Commission by Commission of Association, or their power committed to fewer by *Si non omnes*.

12. By *Stat. 2 & 3 Ph. & Ma.*

18. a General Commission of Gaol Delivery through the County determines not a Special Commission wanted in a Corporation, &c. parcel thereof.

13. By *Stat. 1 E. 6. c. 7.* the subsequent Commissioners of Gaol Delivery, power to give Judgment upon such as were Reprieved before Judgment by former Commissioners and Process before any former Commissioners of Peace, Gaol Delivery,oyer and Terminer, or others not discontinued by granting new Commissions.

If a Prisoner be bailed, he is yet in

in Prison to be Arraigned before these Justices, for he is a Prisoner contrary in case of Mainprize, 21 E. 7. 33. 9 E. 4. 2. 39 H. 6. 27.

Cr. Jur. 226.

Although their Commission determine with their Session, after they are gone, they may command a Reprieve or Execution, Dyer 205.

Licet soit ad Gaolum deliberandum hac vice uncore pnt' adjourner loci Commission. Cr. Jur. 226.

Commission d'Oyer & Terminer, Gaol Delivery, pnt' Estoyer ensemble. Ibid. Bro. Commission 24.

Justices de Gaol Delivery & Oyer & Terminer, pnt' enquire per ambores deux powers, and make up their Records accordingly, 9 H. 7. 9. Cr. Jur. 226.

Oyer and Terminer.

1. **T**He Justices Authority must be by Commission, and not by Writ, otherwise their Proceedings void. 42 Aff. 12.

2. They cannot proceed but upon an Indictment taken before themselves.

3. By good Opinion they may proceed the same Day or Session against a party Indicted before them. *Vota le contrar' ad estre adjudge.*

4. Where Offences are limited to be heard and determined in any Court of Record, generally it may be heard and determined by them. *Quære*, for Gregory's Case *contra*. *Id. Dyer* 236.

5. Others may be added, or their power contracted by Association, or *in non omnes*, as before.

6. One sitting without Adjournment determines their Commission.

M

7. Justices

7. Justices of Oyer and Terminer or of Peace, cannot assign a Coroner, as Justices of Gaol Delivery may.

8. By *Stat. 9 E. 3.* they are also to send their Records determined into the *Exchequer*.

V. 12 Aff. 21.

9. A *Supersedeas* suspends their power, and a *Procedendo* revives it but a new Commission determines it; the like of Commission of *Nisi prius*, &c. but it determines not without Notice.

V. 2 & 3 P. &
M. C. 10.

1. By shewing the new Commission.

2. Or proclaiming it in the County.

3. Or Sessions held by new Commission.

10. An Award upon the Roll not sufficient to return a Jury, but a Precept under Seal of the Commissioners.

11. And *Nota*, That a Special Commission of Oyer and Terminer may be granted to sit in one County to hear and determine Treasons, &c. in another, but then the Indictment must

must be found in proper County ,
and the Trial by Jurors of proper
County. *C.P.C. fo. 27.*

M 2 *Justices*

Justices of Assize.

BY Stat. 27 E. 1. c. 3. *de finibus* Justices of Assize have power to deliver Gaols of Felons and Murderers.

And by some Opinion they may do it *virtute Officii*, without any Special Commission. S.P.C.c. 5.

But in case of Counterfeiting Coin, &c. upon Stat. 3 H. 5. Stat. 2. c. 7. they must have a Special Commission.

Justices

Justices of Peace.

THe *Statute* of 18 E. 3. c. 2. gives them power by Commission to hear and determine Felonies and Trespasses against the Peace.

But then there must be a special *S.P.C.L. 2. c. 5.* Clause in their Commission, *Necnon ad and' & terminand' felonias, &c.* Otherwise they cannot do it.

Yet that Clause doth not in propriety make the Justices of Peace Justices of Oyer and Terminer, because that it is a distinct Commission; and therefore a *Statute*, as that of 5 El. c. 14. limiting Forgery to be heard and determined before Justices of Oyer and Terminer, gives *V.C.P.C. c. 14. Dal. c. 20. 9 Rep. 118.* not the power therein to Justices of Peace; but the Justices of the King's Bench are Justices of Oyer and Terminer within this *Statute*.

By force of the general words of their Commission, they may enquire of Murther at their Sessions; *Dy. 67.* for though by *Stat. 6 E. 1. c. 9.*

and 4 E. 3. Murthers and other Homicides must stay till Gaol Delivery; yet the *Stat.* of 18 E. 3. c. 2. 34 E. 3. c. 1. 17 R. 2. c. 10. hath enlarged their Commission and Power.

Yet in respect the *Stat.* 1 & 2 Ph. & Mac. 13. directs Justices of Peace to take Examinations in Cases of Homicide and other Felonies, and to certifie them to the Justices of Gaol Delivery: In point of Discretion they do forbear to proceed to determine great Felonies.

Dalt. c. 20.

But for Petit Larceny, and other small Felonies, they use to bind over the Prosecutor to the Sessions.

By *Stat.* 4 E. 3.
c. 2.

The Justices of Peace may proceed upon Indictments taken before themselves, or former Justices of Peace: but cannot proceed upon Indictments before Coroner, or Oyer and Terminer; but Justices of Gaol Delivery may; and the Justices of Peace are to deliver the Indictments taken before them to the Justices of Gaol Delivery, by *Stat.* 4 E. 3. c. 2.

They

They cannot deliver persons suspected by Proclamation, as Justices of Gaol Delivery may. Crom. fo. 9.

In Cases of Felonies by *Statute* limited to be heard before Justices of Peace, they may proceed at Sessions; and consequently may bind over Informers, and certify Examinations at Sessions.

But such *Felonies* by *Statute* as are specially limited to Justices of Oyer and Terminer, or other Justices and not to them, the Justices of Peace cannot proceed to take Indictments, as upon *Stat. 3 H. 7. c. 18.* for contriving to destroy the King, &c. upon *Stat. 33 H. 8. c. 12.* Murtherers in the King's Palace; upon *Stat. 8 H. 6. c. 12.* of razing or imbezelling Records; upon *Stat. 5 El. c.* of Forgery; upon *Stat. 13 H. 6. c. 1.* secret imbezelling goods, &c. up *Stat. 2 & 3 Ed. 6. c. 24.* stricken in one City, and dies in another, or accessory in another County.

But in the former cases it seems Dal. c. 20. they may take the Examinations,

and commit the Offenders, and bind over Prosecutors.

If any Indictment be taken before Justices of Oyer and Terminer, Gaol Delivery, or *Coroner*, they cannot proceed upon them; but upon Indictments taken before the Sheriff in his Turn, they may proceed by *Stat. 1 E.4.c.2.*

In cases of Treason, Misprision of Treason or Premunire, regularly Justices of Peace have no Jurisdiction; yet two things may be done:

Dal.c.90.

1. In any case of Treason, because it is a breach of the Peace, they may upon complaint imprison Offenders, take Examinations, bind Prosecutors over, and certifie their Proceedings into King's Bench or Gaol Delivery.

Dal.c. 2.

2. In some cases they are enabled to take Indictments, but not to hear and determine the same, but certifie the same into the King's Bench, upon *Stat. of 5 & 23 El.*

1. Maintainer of Authority of the See of *Rome*.

2. Obtaining Bulls, &c.

3. With.

3. Withdrawing from Allegiance.

4. Bringing in *Agnus Dei*, &c.

A person bringing one before a Justice, suspect of Felony, and refusing to be bound to prosecute, may be Committed, if it appear he can testify materially.

They may Enquire of any Felony within the County, though within the Verge. 4 *R. Wigg's Case*.

Coroner.

Coroner.

Hath power in three Cases:
 1. To take Indictments of
 Death; but this he can only do
super visum corporis, otherwise void
 Hence,

St.PC.fo.52.

1. If the Body be interred before he come, the Townshipp amerced, and he must dig up the Body; so if the Township suffer the Body to lie long to Putrefaction without sending for the Coroner: The like of one dying in Prison.
2. If the Coroner be remiss and comes not being sent for, he shall be fined and imprisoned.
3. He may enquire of flight and such Presentment not Traversable.
4. If the Body cannot be seen the Justices of the Peace may enquire thereof.

Nota.

Nota, The Record of the Coroner of great Authority; if he Record a Confession of a Felony by Approver, a Confession of breach of Prison, an Abjuration, it shall not be Transferred.

5. *Jury dnt' Coroner acquit person*
cise dnt' enquire quis occidit, 11 E.4.
 14 H.7.2.

And it seems by some he hath power to enquire of Rape, Breach Prison.

He hath Jurisdiction upon Arms the Sea, where a man may see from side to side.

2. Concerning *Appeals*.

The Coroner, together with the Sheriff, hath power in the County Court to receive Appeals of Robbery and other Felonies: But then it must be of a Felony in the same County: Upon this Appeal they may grant Process till Utlary; but it seems they cannot send an *Exigent*, because prohibited by *Stat. of Mag. Chart. c. 17.*

St PC. fo. 52.

Such Appeal may be by Bill; and may be removed into King's Bench *Certiorari*, but it must issue both to

St. PC. fo. 64.

to Sheriff and Coroner, and not to Sheriff only.

It appears by *Stat. 3 H. 7. c. 1.* That an Appeal of Murther by Bill, lies before Sheriff and Coroner.

3. The Coroner alone may take the Appeal of any *Approver* of Felony in any County.

St. PC f. 53.

But then he cannot make Process thereupon, but enter it in his Roll and send it to the Justices of Gaol Delivery, who thereupon may issue their Process to the Sheriff of the foreign County, to take the Appellee.

4. To take the *Abjuration* of him that acknowledges a Felony done in the same County, or any other.

And note, That though more Coroners than one in any County, yet any one may exercise any of the Powers before.

But the Presentment of him that is first taken stands.

Sheriff

Sheriff.

THe Power of the Sheriff to take Indictments, was either *virtute Commissionis*, which is taken away by the *Stat. 28 E. 3. c. 9.*

Officii; in his Turn: wherein,

1. The *Turns* must be held *infra* St PC. § 48.
ensem Paschæ & Michaelis; otherwise the Indictments there are void
per Stat. 31 E. 3. c. 14.

2. The Indictments must be under Seal of the Jury by *Statute of Westm. 2. c. 13.* indented *per Stat. E. 3. c. 17.* and the same for Lords of Franchises.

3. The Indictors must be of good name, having 20 s. Freehold, or 26 s. d. Copyhold; otherwise Sheriff punishable by *Stat. 1 R. 3. c. 4.*

4. The Turn can take no Indictment but of that which is Felony by Common Law, or of such Matters as are particularly by Act of Parliament limited to them, and therefore

fore an Indictment of Rape void there.

5. Upon any Indictment of Felony before the Sheriff in his Turn they can make out no Process, but must send them to the Justices of Peace, who have power to proceed thereupon as if taken before themselves, by *Stat. 1 E 4. c. 2.*

Court

Court-Leet.

THe *Court-Leet* hath in effect the same Jurisdiction with the Turn ; but Presentments of Felony before them are to be sent before Justices of Gaol Delivery. 3 *H.4.*18.

The

The means of bringing Capital Offenders to Trial

HAVING considered the Court of Justice, now we come to consider the means of bringing Capital Offenders to their Trial; and that is Regularly by one of the three ways;

Appeal.

Approver.

Indictment.

And herein some things are proper to each proceeding.

§. Some things are common to them all, which come to be considered after Particulars, proper to either, dispatched, *viz.*

Process.

Arraignment; and therein of Principal and Accessory.

Demeanour of the Party Arraigned;

Standing

Standing Mute.

Confessing.

Pleading and Pleas.

Declinatory,

Sanctuary.

Clergy.

In Bar,

Pardon.

Auterfoits Acquit.

Auterfoits Convict.

To the Felony,

Trial.

By Battel.

By Jury, and therein

Process against the

Jury.

Challenge.

Evidence.

Verdict.

By Peers, in case of

Nobility.

N

Judg.

Judgment in the several Cases
Capital.

Execution.

Reprieve.

Falsifier.

By Error.

By Plea.

Appeal

Appeal.

Appeals in respect of the manner of proceeding, are of two kinds

1. By Writ.
2. By Bill.

Touching Appeals *by Bill*, they may be prosecuted.

1. In the King's Bench against any that is *in custodia Marescalli*, or let to bail: they are the Sovereign Coroners.

2. In the Court before Commissioners of Gaol Delivery against a Prisoner, or one let to bail, but not, of one let to Mainprize.

But if one of the Appellees absent, remove in *B.R.* by *Certiorari*.

3. By some other Justices of Peace, *quod Quære* 44 *E. 3.* Coron 95.

4. Before Sheriff and Coroner, as before; and it may be removed by *Certiorari* in *B.R.* 3 *H. 7. c. 1.*

5. Before the Constable and Marshal, of a Felony done out of the Realm, 1 *H.4.c.14*.

In relation to the *Matter*.

Appeals are in *Matter*,

1. *Not Capital*, as an Appeal of Maihem, which may be commenced in King's Bench, Gaol Delivery, or before Coroner and Sheriff.

This, though it be *felonice*; yet is but a *Trespas* in its Nature and Judgment.

2. *Capital*; and that either,

1. Of *Treason*; but this ousted by *Stat. 1 H.4.c.14*.

2. Of *Felony*; and these of three kinds :

1. Of *Death*.

2. Of *Larceny*.

3. Of *Rape*.

Appeal

Appeal of Death.

AN *Appeal of Death* is either by the Wife or Heir.

1. *Appeal of Death by the Wife*; and therein these *requisite*:

1. She ought to be a Wife *de jure*, and not *de facto* only; and therefore *ne unque accouple* a good Plea.

2. But she need not be dowable; for if she had Eloped, or the Husband been Attaint; yet she may have an Appeal of his death.

3. She ought to continue his Widow; for if she marry before, or pending the Appeal, the Appeal fails for ever; or if she marry after Judgment, she cannot have Execution.

2. *Appeal of Death by the Heir.*

1. If the dead hath a Wife, the Heir shall not have Appeal though she die within the year: But if the Wife

kill the Husband, there the Heir shall have an Appeal.

2. He must be Heir by course of Common Law ; this hath these Exceptions :
 1. Where Heir is disabled by Attainder.
 2. Where the Appeal is against the Heir ; in these cases it goes to the next Heir, as if the other were dead without Issue.
 3. It must be by Heir that was Heir at time of death of Ancestor ; for if he die within the year before, or after Appeal commenced, it is lost.

But it seems, if the Heir having Judgment die, his Heir may have Execution.

4. It must be an Heir an Male ; *Nullus capiatur propr' Appellum fœminæ alterius quam viri sui* : But if he be Heir, and Male though he derive through Female.

Females, he may have an C. Lit.
Appeal.

5. A man above Seventy, or an Infant, may have Appeal; but no Battel waged, and adjudged of late times the Parol shall not Demur.

Sed Quære.

But an Idiot, Monk, or Man mute, shall have no Appeal, neither of death, nor otherwise.

And Note, the Appeal of death C.P.C. 53. must be within year and day after death by *Stat. 3 E. 6. c.24.* Striken in one County, and dies in another; or Accessory in one County, to death in another: Appeal brought where party died.

Appeal of Robbery.

Servant robbed, Master or Servant may have Appeal.

But Testator robbed, Executors shall not have Appeal.

Villain shall not have Appeal of Robbery against his Lord; *contra* of Death.

Two joint Owners robbed, Survivor shall have Appeal.

A Woman or Infant shall have an Appeal of Robbery.

If a man be robbed at several times, he must put all into one Appeal.

What omitted is Confiscate.

The Appeal affirms the continuation of the property. Therefore if *A.* rob *B.* in the County of *S.* and go with the Goods into the County of *D.* an Appeal of Larceny lies in the County of *D.* but not of Robbery, for that is upon a taking from the person.

If *A.* be robbed by *B.* who is robbed by *C.* *A.* may have an Appeal of Larceny against *C.*

This

This Appeal may be prosecuted in a year, two, or three, if there was fresh Suit; and the judging of fresh Suit lies in the discretion of the Court.

And Note, This, or any other Appeal lies against an Infant, against a Monk, without naming his Sovereign, against a Feme covert without naming her Husband.

Appeal

Appeal of Rape.

Appeal of Rape.

1. Lies for the party ravished.

2. But if she consented to the Rape afterwards, then by *Stat. 6 H. 2. c.* it is given to the Husband ; none, to the Father ; if none, to the Heir, whether Male or Female.

If she be taken in one County and ravished in another, the Appeal of Rape lies in that County where actually ravished.

Although by *Stat. W. 1. c. 12* whereby Rape was turned into Trepass, forty days is limited for the Suit ; yet it being again made Felony by *Stat. W. 2. c.* and no time limited for it, it may be brought in any reasonable time.

Process in Appeal.

Concerning Process in Appeals,
vi. infra Process in general, because
 many things therein common to
 Appeals and Indictments.

The *Count* in an Appeal.

1. The Plaintiff in his Appeal
 must mention the place and day;
 need not mention the hour; and
 though day be mistaken, not material
 upon Evidence.

2. It sufficeth for Plaintiff to
 count against Defendant, according
 to the construction that the Law
 maketh upon the Fact.

If *A. B.* and *C.* present, and *B.*
 only strike the mortal stroke, he
 may count against them all, that
 they strook: So in Rape.

3. An Appeal by Heir ought to
 hew *Coment.*

4. In Appeal of Rape, *felonice*
capuit sufficient, without saying *car-*
naliter cognovit, *vid. 11 H. 4. 1.*

5. In

5. In Appeal against *A.B.* and *C.* *A.* only appears, he must count against all by the better Opinion.

6. At this day but one Appeal against all Principals and Accessories and if an Appeal be against *A.* and he is attaint or acquit, or Plaintiff non-suit, he cannot have another Appeal against *B.* But if Accessory in one County to Felony in another there several Appeals against Principal and Accessories.

Pleas to the Writ and in Bar.

Writ of Appeal abate,

1. For insufficiency in the Writ, as wanting *rapuit*, false Latin, &c.

2. Multiplicity of Action; a second Writ of Appeal purchased, depending a former Writ abates; but if depending a former in the County abates not.

But if the first Appeal by Bill be removed into the Bench by *Certiorari*, and the Plaintiff had appeared thereupon, and counted, abates the second Writ.

Nul tiel in rerum natura, as one of the Defendants, abates *vers tous*, &c.

Pleas

Pleas in Bar.

*Vid. infra in ceo general Title, as to
Autrefois Convict or Acquit.*

C.P.C. 98.

1. He may plead any thing whereby it appears the Plaintiff is not intituled to the Appeal, *de quibus v. supra.*

2. Nonsuit in a former Appeal after Declaration, so of a *Retraxit.*

3. The Plaintiff brought an Appeal of the same Felony against another, who was acquit or attaint at his Suit.

4. Plaintiff hath released to Defendant; but if Appeal against Defendant, a Release or *Retraxit* as to one, no bar for the other.

5. If Defendant plead in Bar, he may also plead over to the Felony and it shall not be double.

1. But in case of a Release pleaded, he shall not plead over to the Felony, because repugnant.

2. In case of Villenage pleaded he shall not plead to the Felony, because Infranchisement ; yet if that bar found against him, he may plead Not Guilty ; and so in any other case where he pleads in bar without pleading over, except Release.
-

Approver.

Approver.

C.P.C.c. 65.
S.P.C. f. 142.

1. **W**Hat it is to be an Approver?

A person indicted of Treason or Felony not disabled to accuse before competent Judges, confessing the Indictment, and sworn to reveal all Treasons and Felonies he knows, and then before a Coroner entering his Appeal against *participes Criminis* in the Indictment within the Realm.

2. Who may be an Approver, and who not?

1. A Peer of the Realm cannot be an Approver.

2. A person Attainted cannot be an Approver; nor a person out of Prison, though indicted.

3. A Woman, Infant, Idiot, *Non compos*, Clerk, cannot be Approver.

4. But a Man above seventy or maimed may, but he shall not wage Battel.

5. Clerk

5. Clerk Convict may.
3. In what cases?
 1. None can approve but an indicted ; and therefore if only in Prison upon suspicion, he may indeed confess the Felony, but such Confession amounteth not to an Attainder or Conviction, though it be an Evidence, and therefore cannot approve.
 2. The Appellee in Appeal cannot be an Approver.
 3. Appellee of Approver cannot be Approver, for that would be infinite.
 4. Though a person Indicted approve, yet if after an Appeal be against him, the Approvement ceaseth.
 5. He that hath once pleaded to the Felony cannot be Approver, but shall be hanged, for he is found false.
4. Of what Offences?

It must be only of the Offences contained in the Indictment, be it Felony or Treason, and therefore not of another Offence, nor of an Accessory before or after to the same Offence; yet his Oath general therefore as to other Offences, it is but a Detection, not an approvement.

5. Before whom?

Before such Judges only as can assign a Coroner, as King's Bench Gaol Delivery, Oyer and Terminer High Steward; but not before Justices of Peace, Court Baron, or County Court.

But it is in the discretion of the Court either to suffer him to be Approver, or to respite Judgment and Execution, till he hath Convicted all his Partners.

6. How Demesned after Appeal?

1. After Felony confessed up on the Arraignment, a Coroner assigned and sworn in Court to discover Offenders.

2. /

2. A day prefix'd , within which he is to perfect his Appeal before the Coroner , and in every of those days he must Appeal ; for if he fail in any , and the Coroner record it, he is to be hanged.

The time limited to perfect his Appeal by 5 *E. 2. c. 34.* is three days, but that Repealed 15 *E. 2.*

3. During the time limited for his Appeal , he shall be at large, and have 1 *d. per diem* till his Appeal finished.
4. If he Appeal persons beyond Sea, or such as are not in *rerum natura* , and that appear by Testimony of Country, or by Return of Sheriff *quod non fuit invent'* , he shall be hanged.
5. After his Appeal formed before the Coroner, he must repeat it *verbatim* before the Court ; and if he fail
O 2 thereof,

thereof, and the Coroner Record it, he shall be hanged.

7. *Process* in Appeal.

1. In the same County the Coroner may award *Process* to the Sheriff, till Exigent.
2. If Appellee be in a foreign County, then the Judges before whom the Appeal is, may grant *Process*, viz. *B. R.* or *Itinerant* by Common Law; and by *Statute* of 28 *Ed. I. de Appellatis*, the Justices of Gaol Delivery may send *Process* into a Foreign County, as well to apprehend the Appellee, as a *Venire facias* to try the Issue.

S.P.C. 146.

8. *Proceeding* upon Trial.

The Appellee may put himself upon the Country, or wage Battel.

If five Appellees, and they wage Battel, he must fight them all.

If two Approvers against one Appellee, if the Appellee vanquish the first, he is acquitted against the rest
though

though Appellor retract his Appeal, or be vanquished ; yet if the Offence be within Clergy , he shall have it ; and so of the Appellee.

9. Proceeding after Trial.

If the Appellor convict the Appellee , either by Battel or Verdict, the King *ex merito justitiæ* is to pardon him ; and from the time of his Appeal till his Pardon or Conviction, ought to have wages.

O 3

Indict.

Indictments.

THese things considerable :

1. Where ~~an~~ Indictment requisite in cases Capital , and where not.

2. What the quality of Indictors.

3. Of what Matters they may Enquire.

4. Before whom found.

5. What requisite in the manner of them.

1. Where an Indictment requisite for a party to be Arraigned at the King's Suit.

1. By the Ancient Law , if a man was taken in Larceny with the manner , and that brought into Court with the Prisoner, the Prisoner should be Arraigned thereupon without any Indictment. *Stat. P.C. f. 148.*

And such was the use of those Manors that had Infangthef. *Ibid. f. 29. Vid. 1 E. 3. 17. 17 Ass. 49.* but this disused.

2. If

2 If Trespass be brought *de muliere abducta cum bonis viri*, and the Defendant found Guilty: Or if in Trespass for Goods the Defendant be found that he stole them; this in the King's Bench equivalent to an Indictment, and the Defendant put to answer to the Felony. S.P.C.f.94.

3. In some Cases upon Appeals, by Appellors or Approvers not prosecuting, &c. the Defendant arraigned at the King's Suit; because it carries a presumption of Truth; and therefore if the Defendant be both Appealed and Indicted upon a Non-prosecution of the Appeal, the party shall be arraigned upon the Appeal, not the Indictment. 4 E.4.10.

Wherein,

1. If the Plaintiff in Appeal by Writ be Nonsuit before Declaration, he shall not be arraigned at the King's Suit. 1. Because no certainty. 2. The Writ may be at another's Suit, but if it be by Bill either by Appellor or Approver, it seems he shall, because the certainty appears; therefore in the former

O 4

Case,

Case, if there be no Indictment against him, he is dismissed.

2. If the Plaintiff release his Appeal after he hath commenced it, the party shall be arraigned at King's Suit: But if before it was commenced, then not; because it was never well commenced.

3. If the Plaintiff or Approver, after Appeal commenced, confesses it false, or take to his Clergy, or wave his Appeal, yet arraigned at the Suit of the King: But if the Approver after Battel joyned do in the field confess it false, the Appellor hang'd, and the Appellee discharged, because amounts to a vanquishment.

4. If the Appeal abate by Act of the Plaintiff, as taking Husband; or act in Law, as death; Appellee arraigned at the King's Suit: But if it abate by insufficiency in the Appeal, as by false Latin, Misnomer, or because Plaintiff disabled to commence Appeal, as Utlary of Felony, or Trespas; or the year and day past; or Plaintiff not Wife or Heir; Defendant, not arraigned upon Appeal, but may be Indicted.

2. If

5. If the King pardon after Bat-
tel joyned in Appeal by Approver,
no Arraignment at King's Suit, but
Appellee discharged.

And Note, where the Prisoner St. PC. 104.
arraigned upon the Appeal, a *Cesset*
Processus entred upon the Indict-
ment.

The Return of the Sheriff of s. PC.
Rescue or Escape of a Felon, not
sufficient to put the party to answer
the Felony.

2. The second thing considerable,
is the quality of *the Indictor*.

Concerning Indictments in Leets
and Turns, *vide ante* upon *Stat.*
V. 2. c. 13. I E 3. c. 17. I R. 3. c. 4. I E. 4.
3.

There is a General *Statute* that St. PC. f. 33.
refers to all Indictors, as well in case
of Felony as Treason, *11 H. 4. c. 9.*
which requires,

1. Indictors not to be,

1. Persons fled to Sanctuary for
Felony or Treason.

2. Not Outlawed.

3. Not Indicted or Attainted.

4. Not by Conspiracy.

2. That

Indictments.

2. That the Indictors be the King's Liege People.

3. Returned by the Sheriff, or Bailiffs of Franchises.

4. Not at the nomination of any person.

And all Indictments taken contrary void.

Hence it follows :

1. That the Prisoner upon his Arraignment may plead this matter or any Point of the *Statute*, and may plead over to the Felony. *Vide Scarlet's Case.*

2. Though there be twenty of the Grand Jury, yet if one was outlawed or taken at the nomination of another, it avoids the whole Indictment.

By *Stat. 3 H. 8. c. 12.* Justices of Gaol Delivery, or of Peace, where of one of the *Quorum*, in open Sessions, may reform the Panel of the Grand Jury, by putting in and taking out Names, and the Sheriff is to return the Pannel so reformed.

But this takes not away the former *Statute* of 11 *H. 4* nor alters it
By

By *Stat. 33 H. 6. c. 2.*

Special provision is made for the quality of the Indictors in *Lancashire.*

3. Of which things they can Enquire.

Regularly they can Enquire of nothing but what ariseth within the body of the County, for which they are returned.

And therefore if an Indictment for Scandalous Words, or other matter transitory be found upon Not guilty pleaded thereunto, if upon evidence it appear to be spoken in another County, the Defendant is not guilty.

And therefore where Stroke was in one County, and Death in another, he could not be Indicted where the party died.

But for a Nuisance in one County to another, a Jury of the County where Nuisance is committed may indict it.

But divers *Statutes* have Introduced an alteration of the Law in some Capital Cases, 28 *H. 8. c. 15.*

Trea:

Treasons, Felonies, Robberies, Murthers and Confederacies upon the Sea may be enquired, tried, heard, determined, and judged in such Shires and places as shall be limited by the King's Commission to be directed for the same.

A Treason done out of the Land it hath been held that it may be enquired of and tried where the Offender had Lands; but to avoid the Question by *Stat. 35 H.8. c. 2.* all Treasons and Misprisions, or concealments of Treasons done out of *England*, may be enquired, heard and determined by the Justices of the King's Bench, by persons of the County where the Bench sits, or before Commissioners, and in such Shires as shall be appointed by the King's Commission, by good men of the same Shire, as if the Treasons, &c. had been done in the same Shire where inquired.

Upon this *Statute*.

St. P.C. f. 71.

1. If the Bench remove after Indictment into another County, the Trial shall be by persons of the first County.
2. The

2. The King's writing his Name to the Commission, or putting his Signature to the Warrant, sufficient.

3. *Ireland* is out of the Realm to his purpose.

These Statutes stand unrepealed C.P.C. f. 24.
by Stat. of 1 Ma.c. but the Stat. of 2 H.8. c. 4. for trial of Treason in Wales, repealed by 1 Ma.

Again, by Stat. 2 & 3 El. c. 24. C.P.C. 49.
a man stricken in the County of D. lies in the County of S. or Accessory in one County to Felony in another County, may be indicted and tried in the County where the death was, or Felony committed by the Principal; but it must be laid according to truth.

If Inquest conceal any matter presentable before Justice of Peace, they may impanel Inquest to enquire of such Concealments, and remove the Concealers, by Stat. 3 H. 8. c. 1.

4. Before whom found.

Of this before.

5. The

5. The form of Indictments.

St. PC.

1. By Statutes :

4 H. 4 c. 2. *Insidiatores viarum*
 & *depopulatores agrorum*, to
 be omitted in Indictments
 and if inserted, yet Clergy
 not thereby taken away.

37 H. 8. c. 8. Indictment ne
 to be quashed for want of
 the words, *viz. gladiis, bac-*
culis, & cultellis.

2. At Common Law :

1. Want of certainty vitiates
 want of year, day and place.

Indictment for Escape of one ta-
 ken on suspicion of Felony, without
 shewing what Felony, *Male.*

Indictment for receipt of a Felon
 without shewing who received, *Male.*

Indictment *ad magnam Curiam &*
Letam, Male.

Indictment for making Alchimie
ad instar pecuniæ Regis, without
 shewing what Mony, *Male.*

Indictment *quod communis Male-*
factor, without shewing wherein
Male.

Indictment *quod cepit*, or *furatus*
est

est, without saying *felonice*; *abduxit*
equum, without saying *cepit*; or *car-*
naliter cognovit, without saying *Ra-*
uit; or *burgariter*, when it should
 be *Burglariter*; or if Felony before
 Justice of Peace, without saying
ecnon ad diversas felonias, &c. or
 before the Mayor of *London* without
 saying & *Coronatore*; or of a Mur-
 der with a Gun, without saying
percussit, *Male*.

Indictment supposing the Stroak,
Augusti, death 2 *Augusti*, & *sic*
felonice murdravit 1 *Augusti*, *Male*.
 ut *sic murdravit modo* & *forma*
æd', or *præd'* 2 *Augusti*, *Bene*.

Indictment, *quod dedit mortalem*
lagam circa pectus, *Male*: But, *in*
 sinistra parte ventris circa umbeli-
um, *Bene*.

Indictment *de morte cujusdam*
noti, or *felonice cepit bona*, &c. *cu-*
sdam ignoti, or *domus* & *Ecclesiæ*,
 time of Vacation, good.

Indictment of Poysoning with C. P. c. 62.
 veral sorts of Poyson, without
 ewing of which he died: good.

6. *Proof upon Indictments.*

In case of Treason and Misprision by the *Stat. 1 E. 6. c. 12. & 5 E. 6. c. 11.* there ought to be two lawful Accusers, that is, Witnesses upon every Indictment.

C.P.C. 24.

An Accuser by hearsay, is no lawful Accuser within this *Statute*.

The necessity of such Proof upon Indictment of Treason, is not taken away by *Stat. 1 E. 1. 2. 1 & 2 P. & M. c. 11.* but only in the case of counterfeiting Coin.

St.P.C. 164.

But these Witnesses need not be present with the Indictors, but they may send it to them in writing.

Proce,

Process.

NOW we come to those Proceedings that for the most part are common both to Appeals and Indictments. And,

I. Of Process.

1. Upon an Indictment or Appeal of *Death* but one *Capias*, and then *Exigent*: but in case of Robbery, then by *Stat. 25 E. 3. c. 14.* two *Capias*'s, then *Exigent*; but this *Stat.* extends not to death.

2. But Indictments or Appeals of Treason, or any Felony, or Trespass *against a person of another County* after one *Cap'* a second *Cap'* with Proclamations, shall be granted to the Sheriff of that County wherein he is supposed to be conversant before an *Exigent* shall issue by *Stat. 8 H. 6. c. 10.* And

P

upon

upon this *Statute* Process shall go to a County Palatine; and if in the Indictment he be styled *nuper de D.* and so in several Counties, the second *Cap'* shall go to every County.

S.P.C. f.67.

3. In Appeal or Indictment against *Principal and Accessory*, by *Stat. W. 1. c. 14.* Process of Utlary must stay against Accessory till Principal attaint.

But if it be an Appeal by *Writ* which is general till Declaration, the Plaintiff must at his peril distinguish the Process; for if he take his *Exigent* against all, he must Count against all as Principals.

An Appeal against *divers*, one appears and pleads to the Writ, or in Bar, which goes to all, Process of Utlary shall stay against the rest till Plea determined.

An

An Indictment or Appeal may be removed in *B. R.* by *Certiorari*, but it must accord with the Appeal.

Upon an Appeal removed by *Certiorari*, the Plaintiff is without day; and to compel the Plaintiff to proceed, the Defendant may take out a *Scire facias*, and upon two *Nibils* or a *Scire feci*, and default, Defendant discharged.

But the Plaintiff upon such Appeal removed, may have *Capias* & *Exigent*.

If the Defendant comes in by *Capias*, and after appearance make default, a new *Capias*; if upon *Exigent*, a new *Exigent*; and upon second appearance shall plead *de novo*, for the first Issue and Inquest is *sine die*.

Arraignment.

1. **I**N what *manner* a Person is to be Arraigned?

The Prisoner, at the time of his Arraignment ought not to be in Irons.

St. P. C. l. 66.

2. Where arraigned *upon several Appeals or Indictments.*

If a man be indicted or appealed of Robbery or Death at the Suit of one, he shall be arraigned and tried at the Suit of another, because they have several interests in the Judgments.

And now the same Law is of an Indictment of Robbery, because by *Stat. 21 H. 8. c. 11.* the party is to have Restitution.

But if the Appeal by one be not commenced till after an Attainder at the Suit of another, he shall not be arraigned upon the other Suit:

But if the first Attainder be pardoned, he shall be arraigned upon the

the second Appeal commenced after the Attainder.

But after an Attainder of Felony, he may be arraigned for Treason for the King's Interest.

By the Common Law, a Clerk convict should have answered all Felonies, and were acquit or convict at the Suit of others.

But this was remedied by *Stat. 25 E.3.c.4. pro Clero*. And therefore after that *Statute*, the Clerk convict and delivered to the Ordinary, was discharged of all former Felonies whereof he was not arraigned before Clergy; and that although those other Offences were not within Clergy. *Dyer 214*.

But now by *Stat. 8 El. c.4.* after Purgation, and *18 El.c.7.* after burning in the Hand, he shall be put to answer former Felonies upon Appeal or Indictment. *Vid. infra in auterfoits acquit & convict*.

3. Concerning the Arraignment of Principal and Accessory.

Arraignment.

1. Who shall be said an Accessory
Before,
After.
2. How the Proceeding shall be
against them upon their Arraign-
ment.

Prin.

Principal and Accessory.

I. **W**Ho an *Accessory*?

1. In Treason no Accessories, C.P.C. f. 138.
but all Principals : But a
Procurer before , or a Re-
ceiver knowingly after , is
guilty as Principal in High
Treason.
2. Where an Act of Parliament C. PC. f. 59.
makes a Felony, it doth inci-
dently make such Accesso-
ries as would be Accessories
before or after to a Felony
at Common Law ; as in case
of Buggery, Rape, &c.
3. The Accessory cannot be
guilty of Petit Treason,
where the Principal is but
Murther.
4. If divers come to commit
an unlawful act, and be pre-
sent at the time of Felony
committed , though one of
them only doth it, they are
all Principals.

So if one present move the other to strike: Or if one present did nothing, but yet came to assist party if need: Or if one hold the party while the Felon strikes him: Or if one present deliver his Weapon to the other that strikes; for they are *præsentes, auxiliantes, abettantes, or confortantes*.

S.P.C. f.40.

But if one came casually, not of the Confederacy, though he hindered not the Felony, he is neither Principal nor Accessory, although he apprehend not the Felon.

5. In some cases a person *absent* may be Principal.

4 Rep. 44.
Vauxe's case.
C.P.C. 138.

1. He that puts Poison into any thing to poison another, and leaves it, though not present when taken: And so it seems are all that are present when the Poison is so infused, and consenting thereto.

2. If upon the same Ground, or in the same House, though not within view of the Fact, when many come

ome to do an unlawful act: See before Lord *Dacre's Case*, and *Pudsey's Case* in Murther and Robbery.

3. By special Act of Parliament, upon the *Stat. 3 H. 7. c. 2. 8 H. 6. 2.*

2. Accessories *before*; he that commandeth or assenteth to the committing of a Felony, and is absent when done.

1. In Manslaughter there can be no Accessory before, because done ^{4 Rep. Bishop's case.} without premeditation.

2. Where the Execution varies ^{C.P.C. 57.} from the Command in the person slain; as a Command to kill *A.* and he kills *B.* or in the nature of the Offence; as Command to rob *A.* as he goes to Market, and he break open his House and robs it, the Commander is not Accessory.

3. But a Command to poison *J. S.* and he shoots him; a Command to rob or beat *J. S.* and he beats him to death, the Commander Accessory.

4. If *A.* Command *B.* to kill *C.* and before the Fact *A.* repents, and count-

countermands his Command, yet *B* kills him, *A.* is not Accessory.

5. If *A.* poison an Apple, and deliver it to *C.* to deliver to *D.* *C.* not knowing delivers it, Murthe in *A.* but no Offence in *C.*

3. Accessory after.

St. P. C. 41.

1. A Receipt of stolen Good makes not Accessory, unless he receive Thief. *On recieve le biens auter Felon*, 9 H. 4. 1.

2. Every Receipt to make an Accessory, must be knowing him to be such.

But if a man be attaint of Felony in the County of *A.* the Law presumes Notice thereof in the same County: Therefore the Receipt of him in the same County seems Accessory; *Contra*, if in another County. *Videtur cognitio requisita i utroque.*

3. Receipt of a Felon, that hath given Bond to appear at Sessions, &c. not Accessory.

4. Relieving a Felon with Money, Victuals, Horse for his Journey know

knowing Accessory: But if he be in prison, then lawful. *Dal. c. 108.*

5. A Brother receiving his Brother may be Accessory, or a Husband and his Wife, but not the Wife of her Husband.

6. A man may be Accessory to an Accessory: And

The same man may be Principal and Accessory where Felony done by divers.

7. But sending a Letter in favour of a Felon, instructing him to read, advising to labour Witnesses not to appear, not revealing a Felony intended, permitting a Felon to escape without arrest, makes no Accessory: *See Contempt.*

8. Accessory cannot be unless a Felony committed; therefore *A.* wounds *B.* dangerously, *C.* receives him, then *B.* dies, *C.* is not Accessory.

9. Si Felon vient al meason J. S.
que suffer luy d'aler hors, n'est Felony,
nisi prist Mony ou autre chose par luy
suffer Escape. 9 H.4.1.

Arraign.

Arraignment of the Principal and Accessory, and things Observable therein.

IF the Principal be acquitted, S.P.C. 47.
 or be convict only of Man- C. PC. 139.
 slaughter, or *Se defendendo*, or before 4 R. Seyer's
 Attainder hath his Clergy, or be case.
 pardoned, or die, the Accessory shall
 not be arraigned; otherwise if after
 Attainder.

2. If the Principal be attaint at S.P.C. 47.
 the Suit of the King, the Accessory
 shall not be arraigned at the Suit of
 the party. *Issint si soit attaint d'auter*
Felony.

3. If Principal stand mute, Ac-
 cessory not Arraigned. *Vid. Contra*
R. 3.22. 3 H. 7. 1.

4. The *Exigent* shall not go out St. PC. 47.
 against Accessory till Principal at-
 taint by *Stat. W. 1. c. 14.*

5. Where

5. Where Principal appears not Accessory shall be put to answer; but he shall not be tried till Principal attaint or appear, unless he will for he may wave the benefit of the Law.

St. PC. 47.

Com. 100.
Gittin's case.

6. If he be indicted as Accessory to two, and one of the Principals appears and is convicted, the Court may, if they please, try the Accessory; and if he be found Accessory to him that is attaint he shall be Condemned; if not found Accessory to him, yet he may after be Arraigned as Accessory to the other when he appears.

C. West. 1. c. 14.

7. If Principal and Accessory appear and plead to the Felony, they may be tried by the same Inquest: but the Principal must be first Convicted, and have Judgment, before Judgment against Accessory, and the Jury shall be [Charged] that if they find Principal not guilty, they shall find the Accessory not guilty.

8. If Principal be Erroneously attainted, yet Accessory shall not take

take advantage thereof, but be Arraigned.

9. If Murther or other Offence were in one County, and Accessory in another, by *Stat. 2 E. 6.*

24.

1. If Accessory be in *Middlesex*, C. PC p.49. where the King's Bench sits, and principal in another County, the King's Bench may try the Accessory.

2. Certificate in such case shall be upon a *Certiorari* or Special Writ, need be, formed upon the Matter, and not by Precept, under their seals, in their own Names.

Ibid.

3. The High Steward is within the Act.

Accessory al Petit Larceny, 3 Cr. 50. *nemy al Homicide per infortun'*, 5 E.3. Coron. 116.

Novel Felony fait per Stat. vide- r nul Accessory nisi specialment enact e, Vid Dy.88. Stam.44.

Vid. pur Trial d' Accessory in foreign county. 2 E.6.cap.24. Dy.253.

Acquit

*Acquit come Principal nemy arrain
come Accessory: Mes acquit come Ac-
cessory arrain come Principal.*

Mute

*Mute, Paine fort &
dure.*

V. Stat. West. 1.
cap. 12. & estre
inquiry de
offence dnt'
*Paine fort &
dure.*

NOW we come to the *Demeanor*
of the Prisoner upon his ap-
pearance :

And thereupon either,

1. He stands Mute.

2. He pleads.

3. Or he confesseth the Fact.

1. What said a *standing Mate* ?

This of two kinds :

1. When he answers nothing at all: and then it shall be enquired, whether he stand Mute by malice or by the act of God. West 1. c. 12.
St. PC. f. 150.

If it be by the act of God, then the Felony shall be enquired of, and whether he be the same person, as if he had pleaded not guilty.

If by Malice, or if the Prisoner hath cut out his own Tongue, then he shall have Penance.

Nota, *Si ad unfoits pled' al Felony*
Q licet

licet apres estoit Mute, ser' trie, 15 E.
4. 33.

Viez Pere estoit Mute aver' Penance, 7 Car. Lord Castlehaven's Case.

2. When he pleads, but not effectually; as when he answers not directly to the Fact, or concludes not upon the County, then if the cause be probable, he shall be put to his Penance. *C.PC.p.227.*

Nota, Si Chall' ultra 35. Standing Mute. *Vid.C.PC.f0.227.*

2. What *the Consequent* of standing Mute? 1. *Forfeit biens*, 14 E.
4. 7.

1. In Treason it is a Conviction.

2. After Attainder and ask'd what he can say why no Execution, standing Mute he shall be Executed.

3. In Appeal standing Mute, Judgment against him to be hanged. *Contra*, 14 E.4.1.

4. Upon *Stat. 33 H. 8. c. 2.* of Felony within the Verge, Offender standing Mute, Judgment against him.

5. But

5. But in other cases of Felony,
Paine fort & dure, and forfeits
Goods.

1. Remanded to Prison.

2. Lie naked in some dark Room,
with Hands and Legs extended.

3. Weights increased.

Q₂

Pleas.

Pleas.

IF the Prisoner plead, it is either,

1. Declinatory.

Sanctuary.

Clergy.

2. Or to the Felony :

1. Demurring.

2. Pleading in Bar.

3. Pleading the General Issue.

Declinatory Exceptions:

1. *Sanctuary* and the Consequents,
Abjuration ousted by *Stat. 21 Jac.*
c.28.

Clergy.

Clergy.

2. **C**lergy, wherein
1. Who shall have benefit of Clergy?
 2. In what Cases?
 3. At what time?
 4. Who the Judge?
 5. What the Consequent?

1. *Who* shall have Clergy, and who not?

1. A Blind man shall not have his Clergy. *Nec Jew, nec Turk: Contr' de Greek on home excommeng'.*

2. A Woman cannot have the benefit of Clergy.

Provision by *Stat. 21 Jac. c. 6. C. P. c. 124.* that for stealing Goods under 10 s. without Burglary or Robbery, &c. shall be Burnt in the Hand for the first Offence.

3. Bigamy ousted of Clergy by *Stat. de Bigamis 4 E 1.* but restored to it by *Stat. 1 E 6. c. 12.*

Cestuy que abjure aver' Clergy apres son retourne, 8 H.8. Kel.186.

Cestuy que ad unfoits Clergy n'aver' auterfoits, nisi deins Orders, 4 H. 7. c.17.

2. *In what cases ?* Some things premised in general.

1. By Stat. 25 E. 3. c. 4. *pro Clero.* Clergy allowed in all Treasons or Felonies, except Treason against the King ; so that after that Statute, there was Clergy in all Cases, but

{ Treason,
{ Sacrilege.

2. Consequently wheresoever Clergy is not allowable in any other cases, it is taken away by some Act of Parliament.
3. Consequently where any Felony is made by a new Stat. Clergy is to be allowed, unless expressly taken away.
4. Con-

4. Consequently where by any special Act of Parliament Clergy is taken away in any Offence, the Indictment ought to bring the Case within the *Statute*. As upon the *Stat. 3 & 4 Ph. & Ma. c. 4.* the Indictment must run *Malitiose* ; so upon *Stat. 8 El. c. 4.* it must be *clam & secrete* ; in case of Murther, *ex malitia præcogitata*, otherwise Clergy allowable.
5. Consequently a *Statute* taking away Clergy from the Principal, doth not thereby take it from the Accessories before, unless specially provided for.
6. Where Clergy is allowable, it is to be allowed though the party be Convict by Confession , Verdict , or stands Mute , or challenges peremptorily above 35.

2. *Particular Offences* where Clergy, and where not.

1. High *Treason* no Clergy.

2. In Petit *Treason*.

Principal oust of Clergy, if convict by Verdict or Confession by *Stat. 23 H. 8. c. 1.* revived by 5 & 6 *E. 6. c. 10.* and by *Stat. 25 H. 8. c. 3.* though standing Mute, not directly answering, or challenging above Twenty.

Not oust of Clergy in Appeal, unless Convict by Verdict or Confession.

Accessories before the Fact maliciously, oust of Clergy in all cases, by 4 & 5 *Ph. & Ma. c. 4.*

3. Wilful *Murder* of Malice *præpensæ*, Principal oust of Clergy in all cases by *Stat. 23 H. 8. c. 1.* 25 *H. 8. c. 3.* 1 *E. 6. c. 12.*

Accessory before maliciously, ousted in all cases, by 4 & 5 *Ph. & Ma. c. 4.*

4. *Arson*

4. *Arson* of Houses, or Barns full of Corn, Principal oust of Clergy in all cases, *viz. sur* Conviction by Verdict, or Confession, by 23 *H. 8. c. 1.* upon standing Mute, not direct answering, challenge above Twenty, by *Stat. 25 H. 8. c. 3.*

But Utlary stands subject to Clergy.

Accessory ousted of Clergy in all cases by 4 & 5 *Ph. & M. c. 4.*

5. *Simple Burglary.*

Principal ousted of Clergy if utlawed, Convicted by Verdict, or Confession.

Not ousted if stand Mute, challenge above Twenty, or not directly answering.

Accessory before or after not oust of Clergy.

6. *Burglary*, any person being in the House, or put in fear or dread.

Prin-

Principal oust of Clergy in all cases, *viz.* by *Stat. 1 E. 6. 12.* in case of any Conviction or Attainder; and by *25 H. 8. c. 3.* revived by *5 & 6 E. 6. c. 10.* it takes away Clergy where above Twenty challenged.

But Accessories not ousted of Clergy.

7. *Robbery*, which hath several Qualifications, with these Considerations:

1. From the Person,

Without putting in fear, but *clam & secrete*: By *Stat. 8 El. c. 4.* Principal in all cases oust of Clergy, Accessory not oust.

With putting in fear, Robbery in or near the High-way.

1. Principal in all cases oust of Clergy, *viz.* if Appeal or Indictment by *23 H. 8. c. 1.* Convict *23 H. 8. c. 1.* Attaint *1 E. 6. c. 12.* Mute, Challenge above Twenty by *Stat. 25 H. 8. c. 3.* revived by *5 & 6 E. 6. c. 10.*

2. Ac-

2. Accessory before oust of Clergy in all cases, by 4 & 5 *Ph. & Ma. c.4.*
 2. From Dwelling-house; and this three kinds:
 1. Owner, Wife, or Servants being in the House, or put in fear; here Clergy.
 1. As to Principal, taken away by 23 *H. 8. c.1.* in case of Conviction by Verdict, or Confession, and by 25 *H. 8. c. 3.* Revived by 5 & 6 *E. 6. c. 10.* in case of standing Mute, challenge *ultra* Twenty, not directly answering: Also to a Conviction in a foreign County, if it appear by Examination not to be within Clergy in the same County.
 2. Accessory in all cases oust of Clergy by *Stat. 4 & 5 Ph. & Ma. c.4.*
- Nota*, A Stranger in the House brings it not within Statute.

2. Robbing any person by day or night, any person being in the same House, and putting in fear.

Principal oust of Clergy by 1 E. 6. c. 12. in all cases, by challenging Twenty; and 1 Stat. 5 & 6 E. 6. if a foreign County Clergy upon Examination taken away.

Accessories, Clergy taken away by 4 & 5 Ph. & Ma. c. in all cases.

3. Robbing any person in his Dwelling House, the Owner, his Wife, or Children being in any part of the House, or within the precincts thereof; though there be no putting in fear. And this extends to Booths and Fairs.

Principal oust of Clergy by 5 & 6 E. 6. c. 9. in cases where the Offender is found guilty.

Principal thereof in other cases
shall have Clergy ; as in
standing Mute , challenge
ultra Twenty.

Accessory oust by *Stat.* 4 &
5 *Ph.* & *Ma.c.* 4.

4. Robbery to the value of 5 s.
of any Dwelling-house or Out-
house thereunto belonging , though
done in the House, by *Stat.* 35 *El.*

Principal oust of Clergy in case
Conviction , not of standing
mute.

Accessory shall have Clergy.

*Un enter in le Lodging Sir H. Hun-
te parcell de Whitehall , nul person
estant in Lodging, mes in autre part
de Whitehall & infreint un Chamber
prist biens : Rule per advise de
Justices , 1. L' Indictment doit estre
infreindre de maison de Roy vocat'
Whitehall & pur Embleer les biens
de H. H. divers persons esteant in le
maison : Car nient semble al Chamber-
laine de Court , lou chescun ad seve-
ral property. 2. Que ceo fuit deins le
Stat. 5 & 6 *E.* 6. & l' Inditement
accordant. 3. Que in Inditement
sur*

sur Stat. 23 H. 8. vel 5 & 6 E. doit estre actual breaking & au Robbery. 4. Que si laron enter meason le Doors open, & enfrein Chamber, & prist biens, est deins Stat. 5. E. 6. d'ouster luy de Clergy.

8. *Larceny without any of the Circumstances.*

Horse-stealing oust of Clergy, 1 E. 6. c. 12. 2 & 3 E. 6. 33. Principle oust in all cases:

Accessory ousted in no cases.

But other Larceny, not being Robbery nor Cut-purse, have Clergy.

9. *In Rape, Clergy oust by Stat. 18 El. c. 7.*

10. *Though the Offence be within Clergy, yet if he had forfeited his Clergy, and were burnt in the Hand, the Stat. 4 H. 7. c. 13. ousts him of Clergy, unless he were a person in Orders, and then he must produce his Certificate presently, or by time prefixed.*

And see the Stat. 34 & 35 H. 6. c. 14. for the manner of the Certificate of such Convictions and other Attainders.

And though *Stat.* of 32 *H.8.* c. 1. hath put men in Orders in the same condition with others, in reference to Clergy; yet as to this Point of the *Stat.* 4 *H. 7.* the Clause of the *statute* 1 *E. 6.* c. 12. doth give a person in Orders his Clergy the second time in all cases, but in case of, 1. Challenge above Twenty: 2. Outlary.

3. *When Clergy shall be allowed.*

1. Now the use is not to put the party to challenge his Clergy till he hath pleaded, and the Inquest thereupon taken:

1. For advantage of the party, if acquitted. St.PC.f.131.

2. For advantage of the King for forfeiture, if Convict.

2. It may be allowed in Discretion, though the party challenge not.

Allowed under the Gallows, or where Judgment of *Paine fort & dure* given, or where challenge above Twenty.

V. *Crom. Jur.* 126. *Allow South Gallows per Just. B. R. mes nemy Gaol Delivery : Mes poent apres Judg-ment devant adjournment, Dy.205.*

Licet Ordinary retorn' non legit, & est record, & repy al autre Sessions, & tunc legit, avera benefit de ceo Dy.202. 34 H.6.49. Coron.20.

4. The Judge.

The Ordinary is but Minister, the Judge at Common Law is the Judge when and where to allow it, and of the Reading, 9 *E.* 4. 28. *Coron.* 32.

5. What the *Effect* of Clergy allowed :

1. In ancient time the Consequen was delivery to the Ordinary, eithe to make Purgation, or *absque Purgatione*, as the case required.

But by *Stat.* 18 *El.* c.7. now only Burnt in the Hand, which hath these effects ;

1. Enables the Judge to deliver him out of Prison ; but yet if he see cause, he may detain him till he find Sureties of Good Behaviour.

Anc

And by the Stat. 3 H. 7. c. 1.

If Clergy within the year,
he is to be Bailed or Com-
mitted at discretion, till the
year past.

2. It gives him a Capacity to ^{Foxley's case,}
purchase Goods, and retain ^{s Rep.}
the profits of his Lands.

But the Goods he had at the
time of the Conviction are
forfeit.

3. It restores him to his Cre-
dit. *Hob. 377. Searle's*
Case.

Le Stat. 25 H. 8. que toll Clergy del
persons arrain in foreign County sur
examination extend solement al tiels
Felonies d'ont Clergy oust per Stat'

23 H. 8. & nemy per subsequent Stat.

Et pur ceo Rule in Anne Coles Case:

Si feme infreint meason in County de

in day time, & prist biens South

value de 10 s. & eux import in Coun-

y de D. & la arraigne, el serra arse

maine: quia nul mister in pavor

me require per le Stat. 23 H. 8.

Robbery de value de 10 d. & import

in foreign County & la arrain est Pe-

R

tit

tit Larceny, 2 Jac. More's Rep. quia le Stat. 25 H. 8. extend solement al cestuy que demand Clergy, que n'est in case de Pet' Larceny.

Indite de Robbery in quadam via pedestri, avera Clergy: Car le Stat. parle de Robbery in vel prope altam viam regiam. T. 38 H. 8. More 5.

Pleas

Pleas to the Felony.

i. **D**Emurrer.

2. Pleas in Abatement and Bar.

3 The General Issue.

i. For *Demurrer*.

It amounts to a Confession of the C. West. 1. c. 12. Indictment, as laid; and therefore if the Indictment good, Judgment against the Prisoner, and Execution.

2. For Pleas *in Abatement*.

If Prisoner plead *Misnomer* of his St. PC. 181. Sirname unto an Appeal, it goes in 1 H. 5. 5. Abatement: But in case of Indictment, he shall be put to answer the Treason or Felony.

But *Misnomer* of the Christian Names goes in Abatement; and if it be confessed by the King's Attorney, or found, the Indictment falls. 11 H. 4. Coron. 88.

But then he must give his true Name, and by that Name he may be forthwith Indicted.

*Pleas in Bar.**Auterfoits acquit.**Auterfoits acquit :*

1. If a person be acquitted upon an insufficient Indictment or Appeal, yet upon a new Indictment he may be arraigned for the same Felony.

4 *R. Vaux's Case*, *licet Judgment done*.

St.PC.105,
106.

2. *Auterfoits acquit* of one Felony, no Bar to an Indictment or Appeal of another Felony, &c. though committed before the Acquittal.

3. *Auterfoits acquit* as Principal, no Bar to an Indictment against him as Accessory to the same Felony after; But it seems he cannot be after indicted as Accessory before, *Stamf.* 105.

4. In an Appeal of Death or other Felony, *Auterfoits acquit*, upon an Indictment for the same Felony, was a good Bar in all Cases; therefore
if

if an Appeal was pending, the Court would surcease the Arraignment of the Prisoner upon an Indictment till it was determined : Or though no Appeal pending, yet in case of death, would surcease till the year past.

But at this day *Auterfoits acquit* in an Indictment of Death no Bar to an Appeal, by *Stat. 3 H.7. c.1.* for the Prisoner, notwithstanding the Acquittal ; but in other Appeals it stands a Bar to an Appeal.

5. But *Auterfoits acquit* in an Appeal, Bar to an Indictment of the same Felony.

1. Unless the Appeal be Erroneous in substance.
2. Or unless the Appeal be by a wrong Person.
3. Unless the Acquittal be by Battel ; for in these cases he may be indicted again.

6. He that pleads this Plea, need not have the Record *in poigne*, because it goes in Bar. 3 *E.3. B. Coron.* 217.

R 3

7. Though

7. Though there be *Variance* between the Indictment, &c. yet if it be such as may admit an *Averment*, to be the same, yet it may be pleaded.

Variance in the Name, if *Conus per un Name & auter*.

Variance in the Day of Felony supposed to be committed.

Variance in the Place, but by the Opinion of 4 *H.* 5. acquit of Larceny in one County no Bar in another.

Variance in l'Offence auterfoits acquit, *attaint de Murther ou Manslaughter turr' Petit Treason*.

Auter-

Auterfoits Convict or Attaint.

I. Where a Bar to the same Felony :

1. *Auterfoits attaint* of the same Felony in an Appeal Bar to an Indictment ; for the Effect is obtained, the death of the party : But *vid.* no Bar in Appeal.

C.P.C. 213.

2. *Auterfoits convict* by Verdict or Confession of Manslaughter in an Indictment and had Clergy, Bar in Appeal, though it be of Murder, for the Fact the same in both, though the Offences differ in degree.

⁴ Rep. 45.
Wigg's case.

Auterfoits acquit sur insufficient Exditement, & nul Judgment done, n'est plea : Mes auterment est si Judgement soit done tanque ceo revers.
Vauxe's Case, 4 Rep.

2. Where a Bar to an Arraignment for another Offence.

S. PC. 107.

1. *Auterfoits attaint* of Felony, is no Bar to arraign him of Treason committed before the Felony for the King's Interest.

C. PC. 213.

And it seems, if the Treason was committed after the Felony, then he shall be arraigned of the Treason, for the Offence is different.

2. *Auterfoits attaint* of one Felony, Bar to an Arraignment of Felony: But this hath these *Exceptions*,

1. Where the first Attainder is pardoned, there he may be arraigned for the former Felonies, though committed before.

S. PC. 66, 107.

2. In case of Appeal he shall be arraigned at every one of their Suits, notwithstanding he be attaint at one Suit.

The like it seems upon indictment of Robbery, because by the *Stat.* the party is to have restitution.

3. *Auter-*

3. *Auterfoits convict*, and had Clergy after *Stat. 25 E. 3. c. 5.* had been a Bar to an Arraignment for another Felony, though not within Clergy. *Dy. 214.*

But now by *Stat. 8 El. c. 4.* after Purgation, and *18 El. c. 7.* after burning in the Hand, he shall be put to answer former Felonies not within Clergy, or for any offence after Clergy allowed.

And Note, That he that pleads a Plea in Bar to an Indictment or Appeal that confesseth not the Felony, shall plead over to the Felony; otherwise if it confess the Felony; as Pardon, or Release.

Pardons.

Pardons.

3. **P**ARDONS
Are either of *Course and Right*; such are,

1. For a person Convict of Man-
slaughter, or *Se defendendo*.

2. An Approver that vanquisheth
the Appellee.

St.PC.102.

Pardons of Grace :

1. Some things requisite to their
allowance *by Statute*.

1. By *Stat. 13 R. 2. c. 1*. Pardon
of Murther, Rape or Treason must
be especially expressed in the Pardon,
otherwise it ought not to be allowed
in such cases. *Vide si extend al Petit
Treason & Accessories*, 22 E. 4. 19.
Lam. 293.

2 By *Stat. 10 E 3. c. 2*. there must
be Surety of good abearing, other-
wise the Charter void; but a special
Non obstante may prevent it.

2. Matter

2. Matter *at Common Law* considerable.

1. Charter of Pardon no Bar of an Appeal; and if the party be Ut-lawed in Appeal, and the King pardon, he shall have a *Scire facias* against the Appellor, who may pray Execution notwithstanding such Pardon; but if returned *Scire feci*, and appears not, then Appellee shall upon the Pardon be discharged.

2. Pardon of all Felonies is no Bar to Execution, if the Felon be Attaint; yet an Exception of all Burglaries excepts the Burglary for which the party is Attainted.

3. Pardon of all Attainders, not good with a pardon of the Felony.

4. The Pardon of Felony reciting in the Pardon that the party is Indicted, and in truth he is not, this is void.

5. The

C.P.C. 337.

5. The King may Pardon the Burning in the Hand in Appeal, & l'Imprisonment per ceo discharge.

6. S'il apres infreint Peace Scire fac' gist a repealer le Pardon, & serra pendu pur primer Offence per le Stat. 10 E. 3. 3 H. 7. 7. viz. nisi soit non obstante le Stat.

7. Pardon de tout Felonies per A. & B. vel eor' alter' commit' pardon several, Dy. 34. 22 E. 4. 7.

Pleading the Pardon.

He that pleads a General Pardon by Parliament, wherein are Exceptions, must aver that he is none of the persons excepted.

But of a General Pardon by Parliament without Exception, the Court *ex Officio* must take notice.

He that pleads a Particular Pardon,

1. Must shew it under Seal.

2. Must have a Writ of Allowance, *qu'il ad trove Surety som'*, Stat. 10 E. 3.

Mes

*Mes lou nul brief d'allowance nul
mort. 5 E.4.132.*

3. If Variance, he must aver that
the same person.

General

General Issue.

TH U S far of Pleas in Bar upon Indictments or Appeals: Now we come to *Pleas to the Fact, Not Guilty.*

1. Regularly he that pleads any Special Matter in Bar in Cases Capital, that confesseth not the Felony, notwithstanding the Plea found against him, the Felony shall be enquired of, and therefore he shall plead over to the Felony.

2. The immediate *consequent* of this Plea is *Trial*; and that is either,

By the Country.

By Peers.

By Battel.

Trial

Trial per Patriam.

I. **C**ONCERNING Trial *per Patri-*
am; and therein,

1. Where Issues tried.
2. What Process against Jury.
3. Before whom.
4. Challenge.
5. Evidence to be given.
6. Verdict.

I. *Where* tried.

1. For Trial of *foreign Treasons* and foreign Accessories, or stroke in one County, and death in another, *vide supra* in Indictments.

2. For Trial of *foreign Pleas* by Stat. 22 H.8. c. 14. made perpetual by 32 H.8. c. 3. Foreign Pleas pleaded by a person indicted of Felony, and Triable by the County, shall be tried where the party is Arraigned; but it is now in Treason triable in the foreign County by virtue of Stat. 1 & 2 Ph. & Ma. c.

2. *Pro.*

2. *Process against the Jury.*

1. *Nota*, The Justices of Gaol Delivery have their Pannel returned by the Sheriff, without any Precept, by a bare Award; but Justices of Oyer and Terminer not.

2. By good *Opinion*, the Justices of Peace, or Oyer and Terminer, cannot make their *Venire facias* to try an Issue retornable the same Sessions; but Justices of Gaol Delivery clearly may.

St. PC. f. 155.

3. If several persons Arraigned upon an Indictment or Appeal, and they severally plead Not Guilty, the Plaintiff may take out one *Venire facias*, or several.

4. If the *Venire facias* be joynt, Challenge by one drawn against all.

Crom. 100.

5. Though Pannel be joynt, and *Tales* awarded, yet Court of Gaol Delivery may after sever the Pannel to prevent that inconvenience.

6. In Appeal, if after Issue Plaintiff tries it not, a *Venire* by *Proviso* may be for the Defendant; yet upon that *Venire* Plaintiff may have a *Tales*.

3. *Tales*.

1. If a full Jury appear not, or be challenged in Indictment or Appeal, the Plaintiff may have a *Tales*.

2. Upon Indictment or Appeal, because Defendant may Challenge peremptorily, *Tales* may be granted larger than the Principal Pannel, as forty *Tales*, 14 H.7.7.

3. But the succeeding *Tales* must be less than the former, unless the first be quashed, and then the same number with that which is quashed.

4. If any of the Jury die before sworn, a new *Tales* grantable.

3. *Before whom ?*

1. A *Nisi prius* not grantable where the King Party, unless prayed by his Attorney.

2. By *Stat. 14 H. 6. c.* Power to Justices of *Nisi prius* to give Judgment in Felony and Treason tried before them.

3. By *Stat. 42 E. 3. c. 11.* Enquest in Assise and Gaol Delivery may be taken before the Pannel returned in Court, but not in other Cases.

4. Chal-

Challenge.

4. Challenge of Array or Polls.

1. *Ex parte Regis*, by Stat. 33 E. 1. c. the King shall not Challenge without Cause; but yet he is not compellable to shew the Cause till the Pannel perused.

2. *Ex parte prisonarii*, the Challenge is either Peremptory, or upon Cause.

1. Peremptory Challenge.

1. A Peremptory Challenge not allowable, but where the life of a Prisoner comes in question, and therefore not upon Collateral Issues.

2. At Common Law he might have challenged peremptorily 35 under three full Juries; and if he challenged above, he should have Judgment to be hanged, 3 H. 7. 12.

But by Stat. 22 H. 8. c. 4. made perpetual, by 32 H. 8. c. 3. it is reduced to 20; and now if he Challenge above 20, he shall not be therefore hanged, or forfeit, but his

C. PC. 227. Challenge Over-ruled , and he put upon his Trial; yet *vid. Statutes, semble contra.*

3. In case of Treason and Petit Treason, the Challenge of 35 restored by Stat. 1 & 2 Ph. & M. c. 10.

2. Challenge *for Cause*; we mention but three;

1. Cause of *Insufficiencies*. By the Stat. 2 H. 5. c. 3. 40 s. *per Ann.* required in County; but this, as to Aliens, corrected by 8 H. 6. c. ult. in Cities by Stat. 23 H. 8. c. 13. Goods to the value of 40 l.

2. *Unindifferency*.

Indictor not to be of Jury by Stat. 25 E. 3. c. 3.

3. In reference to an *Alien*, & *medietat' linguæ*, where

1. In no case Indictors ought to be *de medietate linguæ*.

2. In Treason trial *per medietat' linguæ* *repel* per Stat. 1 & 2 Ph. & Ma. *que ad* *repel* 28 E. 3. in that case.

3. In

3. In Appeal by an Alien against an Alien, no *medietat' linguæ*.
4. Scot no Alien, to have *Medietatem linguæ*.
5. The Jurors need not be of the same Nation, but any Aliens.
6. He that will have advantage of Trial *per medietatem linguæ* must pray it, otherwise he cannot have benefit by way of Challenge, Dy. 304, 357.
7. *Egyptians* excluded from the Trial per 1 & 2 Ph. & Mac. 4.

Evidence.

5. **E**vidence to the Petit Jury.

1. In case of *Treason*,
There must be two Accusers or Witnesses by *Stat. 1 E. 6. c. 12. & 5 E. 6. c. 11.* and this notwithstanding *Stat. 1 & 2 Ph. & Ma. c. 11.* but only in case of *Treason* for Counterfeiting Coin.

These Witnesses must not be only by hear-say.

2. In case of *Felony*.

1. What allowed as Evidence :

1. By *Stat. 1 & 2 Ph. & Ma. c. 13. & 2 & 3 Ph. & Ma. c. 10.* the Justice hath power to Examine the Offender and Informer.

2. The Examination of the Offender not upon Oath, but Subscribed by him.

3. Examination of others must be upon Oath.

4. This must be certified by the Justices.

1. If

1. If it be but a small Felony,
to the Sessions.

2. If it be a great Felony, &c.
to the next Gaol Delivery.

5. These Examinations, if the
party be dead or absent, may
be given in Evidence.

But Prudence to have the
Justice or his Clerk sworn
to the truth of the Exami-
nations.

6. But Examinations, taken
upon a Cause of Divorce for
a forcible Marriage, not al-
lowed to be read upon an
Indictment upon 3 *H. 7.* for
the same Marriage.

2. By whom.

1. *Wife*, or her Examination, Dalt. c. 111.
not to be used for or against
her Husband.

2. The Examination of an *In-
fant* of Thirteen, nay, of
Nine allowed in some cases.

3. One Attaint of Conspiracy,
Forgery, or Perjury, not al-
lowed a Witness.

4. One duly set on Pillory. C.P.C. 219.

3. In what manner.

1. Evidence for the King always upon Oath.

C.P.C. c.22.

But Evidence for the Prisoner not upon Oath; yet no known Law that restrains it: But by some *Statutes* in some cases, Evidence for the Prisoner upon Oath, as 31 *El.c.4.* 4 *Jac.c.1.*

The Confession of the Offender taken upon Examination, Evidence with Oath not of the Informer.

4. Where Evidence maintains the Indictment.

1. If the Indictment be of a Felony, &c. at one *day*, though the Evidence be of another day, the Jury may find generally against Prisoner, and leave the person that is interested in point of time to falsify: Or the Jury may find the true day upon their Verdict, and then the forfeiture shall relate thither.

C.P.C. 6230.

3. If the Indictment lay the Felony at one *place*, the Evidence proving the Fact at another place

in

in the same County, maintains the Indictment.

3. If the Indictment and Evidence differ in *specie mortis*, then it maintains it not: as Indictment of Poisoning, Evidence of Stabbing maintains it not.

But if the Indictment be of poy: C.P.C. 135.
soning with one kind of Poison, and the Evidence of another; or of killing with a Dagger, and the Evidence is of killing with a Staff, yet it maintains the Indictment; for it agrees in substance and kind. ^{9 Rep. Mackally's case.}

The like of Accessories before, though the Poison or Weapon different.

4. Indictment that *A.* gave the mortal blow, and *B. C. and D.* were *præsentes & abbettantes*; Evidence that *B.* gave the blow, and *A. C. and D.* *præsentes & abbettantes*, yet it maintains the Indictment.

5. Indictment of *A.* as Accessory ^{9 Rep. Sanchar's case.} to *B. and C.* Evidence proves him Accessory only to *B.* maintains the Indictment.

6. In-

6. Indictment of Murther ; *ex malitia præcogitata* ; Evidence of malice in Law, as killing an Officer, or without Provocation, yet maintains the Indictment.
 7. Indictment upon *Statute* of Stabbing, 21 *Jac.* Evidence that the Dead strook first, yet Evidence to maintain the Indictment for Manlaughter generally, *H. 23 Car. Horwood's Case.*
 8. Two indicted as Principals, Evidence proves one Accessory before, he shall be discharged of that Indictment, 26 *H. 8. 5.*
 9. *Vid. Stat. 21 Jac. c. 27.* Mother endeavouring to conceal the death of her Bastard-child, shall suffer death as in case of Murther, unless she prove by one Witness that the Child was born dead.
- Vid. Act. 17 Car. in fine*, for the farther relief of His Majesty's Army in the Northern parts. Act continued till end of next Sessions ; continued over till some Act of Parliament for their continuance or discontinuance.

Verdict.

Verdict.

6. **V**erdict in cases Capital.
 1. It must be given, and St. PC. 165.
 the Jury cannot be discharged till
 it be given.

2. It must be given openly in
 Court, and no privy Verdict.

3. It may be found Specially; as
 an Indictment of Murther, the Jury
 may find him Guilty,

1. Of Manlaughter :

2. *Per Infortunium* :

3. *Se defendendo*.

But then they must find the man-
 ner of it, that the Court may judge
 thereof; so for the value or the man-
 ner of the Larceny.

Trial by Battel, Peers.

Now we should come to Trial,
 By Battel.

By Peers: *Vid.* the whole
 Process thereof, *C. Pl. Cor. 27.*

Judg-

Judgments in the several Cases.

I. **I**N *High Treason* :

C. PC. 218,
219.

1. In all Cases, except Counterfeiting Coin, Drawn, Hang'd, Entrails taken out and burnt, Head cut off, Body quartered, Head and Quarters hang'd up.

2. In Counterfeiting Coin, Drawn and Hang'd: *Issint per tonsure. Dy. 230.*

But the Judgment of a Woman in those cases, Drawn and Burnt.

II. *In Petit Treason*:

1. For a Man, Drawn and Hang'd.

2. For a Woman, Drawn and Burnt.

III. *In Felony*.

Hang'd till Dead: And this cannot be by the King altered to Beheading.

IV.

IV. *In Petit Larceny.*

To be Whipt.

He forfeits Goods.

V. *Death per infortunium.*

No exprefs Judgment; yet forfeits Goods.

VI. *Death Se defendendo.*

No exprefs Judgment; yet forfeits Goods.

VII. *Misprision of Treason.*

Forfeits Goods; forfeits Profits of Land during Life; perpetual Imprisonment.

Vide for Seifure of Goods.

1. Not before Indictment.

2. Nor removed before Attainder, 1 R. 3. c. 3.

Falsifying Attainders.

Falsifying Attainders.

1. By the Party, by *Writ of Error*.
2. By others *Falsifying* it.

1. A Purchaser may falsifie an Attainder of the Vendor by Utlary or Confession in the point, if he purchase before the Attainder, and after the time of the Felony supposed

2. A Purchaser *Mesne* between the time of the Felony committed, and the Attainder by Verdict, cannot falsifie in the point of the Offence, but he may for the time.

3. If the Attainder was by such as had no good Commission, the Party himself may falsify the Attainder. *Casus Com. Leicest.*

4. If the Principal attainted, and then the Accessory and Principal reverse the Attainder, the Attainder of the Accessory is *eo ipso* avoided, and his heirs may have *Mort danc'* against the Lord by *Escheat*.

5. Attain-

5. Attaint of Treason, and then the Treason is pardoned by Act of Parliament, the party or his Heir shall falsify Attainder.

6. In Case of *Goods*.

1. *Fugam fecit* found by the Coroner cannot be falsified, though upon his Arraignment it be found he did not fly: But if the Indictment be void or insufficient, no Forfeiture.

2. A man indicted before Justices St. PC. 184. of Oyer and Terminer, acquitted by Verdict, and found he fled, and the particulars of his Goods found, they may be Traversed.

3. Default till *Exigent*, though after acquitted, Goods forfeited; for it is a *fugam fecit* in Law.

But if the Indictment, Appeal, or Process insufficient, the Forfeiture saved; so if it be reversed by Error, or pardoned before *Exigent*.

Nota, Flight or *Exigent* in case of Petit Larceny, forfeits Goods.

Execution and Reprieve.

C. PC. 212,
217.

I. **T**He Execution must be pursuant to the Judgment, and cannot be altered by the King, as from Beheading to Hanging.

2. But King may pardon part of the Execution; as in Treason, he may pardon all but Beheading.

3. It must be done by the proper Officer.

C. PC. c. 7.
217.
St. PC. f. 198.

4. If a Woman, Convict of Treason or Felony, be quick with Child, she shall have one Reprieve, but not a second time.

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